TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 229. 89

THE UNITED STATES, APPELLANT,

vs.

THE ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 20, 1900.

(17807.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 322.

THE UNITED STATES, APPELLANT,

vs.

THE ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

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In the Court of Claims.

ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION COMPANY
vs.
THE UNITED STATES.
} No. 18626.

I.—*Order as to the making up of the record on appeal.*

The clerk is directed in making up the record to embody all the motions and orders pertaining to the judgment, and the motions for new trial, and motions for amending the findings of fact, and the orders overruling the motions, and the opinions of the court, but not to include any of the evidence in the cause except that which the findings of the court establish.

BY ORDER OF THE COURT.

Filed June 9, 1900.

II.—*Petition.*—Filed October 17, 1894.

To the honorable the chief justice and judges of the Court of Claims:

The petition of the St. Louis and Mississippi Valley Transportation Company, a corporation duly incorporated under the laws of the State of Missouri, and having its principal place of business in the city of St. Louis, in the said State, respectfully shows:

1. That the claimant was, at the times hereinafter mentioned, the owner of the towboat "Future City," her barges in tow, and freight earnings, and makes this its petition under the provisions of an act of Congress approved August 3rd, 1894, and entitled "An act granting jurisdiction and authority to the Court of Claims in the case of the
2 towboat 'Future City,' her barges, cargoes, and so forth," a copy of which is hereunto annexed, marked "Exhibit A," and made part hereof.

2. That on the 7th day of May, 1888, and for a period of many years prior thereto, the claimant was engaged in transporting grain and other merchandise in barges upon the Mississippi River, between the cities of Saint Louis, in the State of Missouri, and New Orleans, in the State of Louisiana. On the 29th day of April, 1888, its said towboat, with barges "25," "73," "50," "43," and "37" in tow, sailed from Saint Louis bound for New Orleans, and on arrival at the port of Cairo, Illinois, the following day (April 30th), added to the said tow barges "66," "67," "68," and fuel barge "54," all the foregoing barges except "54" being fully laden with corn, wheat, and miscellaneous merchandise. In accordance with custom, the steamer's fuel barge, No. 54, was left at a point near Vicksburgh, Miss., when the "Future City" proceeded with the remainder of her tow, nothing worthy of note occurring until on the 7th day of May, 1888, about 1 o'clock p. m., while descending the Mississippi River and proceeding toward the portion of the public wharf which the said city of New Orleans had set apart as a mooring place for the claimant's vessels. The said towboat and barges were staunch, sound, and seaworthy, and the former was fully manned, officered and equipped, and in every way fit for the service in which she was

engaged, and was amply powerful and able to handle and manage her said tow. The said towboat, at the proper point, made the preparations which, in the usual course, were necessary for a descending towboat, in order that she and her tow might make her said mooring place in accordance with the ordinances of the said city. While she was so engaged she encountered a severe storm of wind and rain; the rain made it
3 impossible for her pilot or her officers to make out objects ahead of them. When the rain accompanying the storm had passed over, the said towboat was found to be in a proper position from which to make her said mooring place with her tow in safety. Her pilot, officers, and crew then, for the first time, discovered the United States vessels of war "Atlanta," "Galena," "Ossipee," "Yantic," and "Richmond" lying at anchor directly in the proper track of all vessels descending the Mississippi River and bound for the city of New Orleans. The said "Atlanta" was then distant from the said towboat about one hundred and fifty yards, and the said "Galena," "Ossipee," "Yantic," and "Richmond" were below her in the river, in the order named, at intervals of about seven hundred feet, and at distances varying from four hundred to six hundred and fifty feet from the New Orleans shore of the river. The said towboat, her pilot, officers, and crew, made every effort possible, and pursued the only course feasible to prevent a collision with the said vessels of war, but owing to the narrowness of the space between the said "Atlanta" and the New Orleans shore of the river, and in spite of the efforts of the said towboat, her pilot, officers, and crew to prevent it, the said barge "73" came into collision with the said "Atlanta" and was thereby cut down, and, as a result thereof, became a total loss. The said barge "73" was of the value of eight thousand dollars. Thereafter and in spite of the continued efforts of the said towboat, her pilot, officers, and crew to prevent it, the said barge "68" came into collision with the said "Galena," and, as a result thereof, sank immediately and became a total loss. The said barge "68" was of the value of nine thousand dollars.

And thereupon all the fastenings of the said tow were parted and greatly damaged, and the said tow was broken up, and the rigging of the said towboat was greatly damaged, so that she could no longer control
4 the said barges, and the said barge "50" drifted down upon the said "Richmond" and was thereby greatly damaged, to wit, to the amount of one thousand two hundred and fifty dollars and seventy-five cents.

3. That furthermore, as a result of the said collisions, the freight earnings of the said barges "73" and "68," for the voyage which was in progress, and which amounted to the sum of five thousand six hundred and seventy-seven dollars and thirty-eight cents, were not earned by or paid to the claimant.

4. That the said vessels of war were lying at anchor in unusual and improper positions, whereby they rendered the navigation of the Mississippi River at that point extremely dangerous, if not impossible, for towboats and tows descending the said river and bound for New Orleans. There were, at the times aforesaid, suitable and proper anchorage grounds nearer the shore opposite to the city of New Orleans and lower down the river, where it was customary for all merchant vessels to lie at anchor,

and where the said vessels of war could have anchored conveniently, and with entire safety to them, and where they, while lying at anchor, would not have interfered with the navigation of the said river, or rendered the same dangerous. The said vessels of war came to anchor in their said positions on the 5th day of May, 1888, and the officers, pilot, and crew of the said towboat had no means of knowing or being informed, and did not know of their position before they were discovered as aforesaid, after which there was not sufficient time and space to prevent the said collisions. The said collisions and the injury and loss resulting therefrom were solely and directly the result of negligence on the part of those in charge of the said vessels of war.

5. That the loss and damage sustained by the claimant in the
5 loss of the said barges "68" and "73," and of the freight earnings thereof, and the damage done to the rigging of the said towboat, and to the said barge "50," which resulted from the said collisions, amounted to the sum of twenty-four thousand three hundred and eight dollars and eighty-five cents, as more fully appears from the bill of particulars hereunto annexed, marked "Exhibit B," and made part thereof.

6. That the claimant is the only person owning or interested in the claim above set forth, and no assignment or transfer of the said claim, or any part thereof or interest therein, has been made; that the claimant is justly entitled to receive from the United States the sum of twenty-four thousand three hundred and eight dollars and eighty-five cents, after allowing all just credits and offsets; that the claimant has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government; and that the claimant believes the facts hereinbefore stated to be true.

Wherefore the claimant prays for judgment against the United States in the sum of twenty-four thousand three hundred and eight dollars and eighty-five cents ($24,308.85) and for such further relief as this honorable court may be entitled to grant, at law, in equity and in admiralty, in the premises.

ST. LOUIS & MISSISSIPPI VALLEY TRANSPORTATION CO.,
By HENRY C. HAARSTICK, *President.*

JOS. K. MCCAMMON,
JAMES H. HAYDEN,
Attorneys for Claimant.

GIVEN CAMPBELL,
Of Counsel.

6 STATE OF MISSOURI, *City of St. Louis, ss:*

Henry C. Haarstick, being duly sworn, deposes and says that he is president of the St. Louis and Mississippi Valley Transportation Company, the claimant named in and which signed the foregoing petition; that he has read the same and knows the contents thereof, and that he believes the facts stated therein to be true.

HENRY C. HAARSTICK.

Subscribed and sworn to before me this ninth day of October, A. D. 1894. My term expires March 21, 1898.

[SEAL.] F. P. JONES, *Notary Public.*

Exhibit A.

An act granting jurisdiction and authority to the Court of Claims in the case of the towboat "Future City," her barges, cargoes, and so forth.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the legal, or equitable owners, or claimants of the steam towboat "Future City," her barges in tow, cargoes thereon, freight, and personal effects contained in them, alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war "Atlanta," "Galena," and "Richmond," in the Mississippi River at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal, as in other cases: *Provided*, That no suit shall be brought under the provisions of this act after six months from the date of the passage thereof: *And provided further*, That no judgment shall be rendered against the Government, unless it shall affirmatively appear from the evidence adduced that such collision was the result of negligence on the part of the officers in command of said vessels of war.

Approved, August 3, 1894.

Exhibit B.

Memorandum of losses sustained by the Saint Louis and Mississippi Valley Transportation Company, by the collision between their steamer "Future City," and barges, and the United States fleet in harbor of New Orleans, May 7, 1888.

Barge No. 68, total loss		$9,000.00
Barge No. 73, total loss		8,000.00
Freight earnings, barge No. 68		2,832.50
Freight earnings, barge No. 73		2,844.88
Repairs to barge 50		1,250.75
Damage to rigging of steamer "Future City:"		
6 pair blocks, at $4.90	$29.40	
3,055 pounds line, at 11½ cents	351.32	
		380.72
Total		24,308.85

7 III.—*Traverse.*—Filed, October 26, 1897.

In the Court of Claims of the United States.

The St. Louis and Mississippi Valley Transportation Co. vs. The United States.	December term, A. D. No. 18626.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every

allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney-General.

8 IV.—*Findings of fact and conclusion of law.*

On the 21st day of March, 1898, the court filed findings of fact and conclusion of law.

Subsequently, to wit: On May 14, 1900, the court filed an order withdrawing its former findings of fact in this case, and filed amended findings in lieu thereof and which are as follows:

Findings of fact.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

On August 3, 1894, the following act of Congress was approved:

An act granting jurisdiction and authority to the Court of Claims in the case of the towboat "Future City," her barges, cargoes, and so forth.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the legal or equitable owners or claimants of the steam towboat "Future City," her barges in tow, cargoes thereon, freight, and personal effects contained in them, alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war "Atlanta," "Galena," and "Richmond," in the Mississippi River, at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal, as in other cases: *Provided*, That no suit shall be brought under the provisions of this act after six months from the date of the passage thereof: *And provided further*, That no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war.

(28 U. S. Stat. L., p. 219.)

II.

The claimant is and was at all times hereinafter mentioned a corporation incorporated under the laws of the State of Missouri.

9

III.

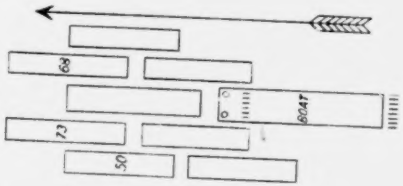
On May 7, 1888, and for many years prior thereto, the claimant was engaged in transporting grain and other merchandise in barges upon the Mississippi River, between the ports of St. Louis, in the State of Missouri, and New Orleans, in the State of Louisiana.

IV.

On May 7, 1888, and at all times hereinafter mentioned, the claimant was the owner of the steam towboat "Future City" and barges "50," "68," and "73," and of the freight earnings of the said towboat and barges.

V.

The "Future City" sailed from the port of St. Louis on April 29, 1888, bound for the port of New Orleans with a tow consisting of eight barges, including barges "50," "68," and "73," all of which were heavily laden with grain and other merchandise, and a fuel barge which was left in the neighborhood of Greenville, Miss. These barges, in accordance with a custom well recognized and prevailing upon the Mississippi River, were arranged about the "Future City" in the manner shown by the following diagram:



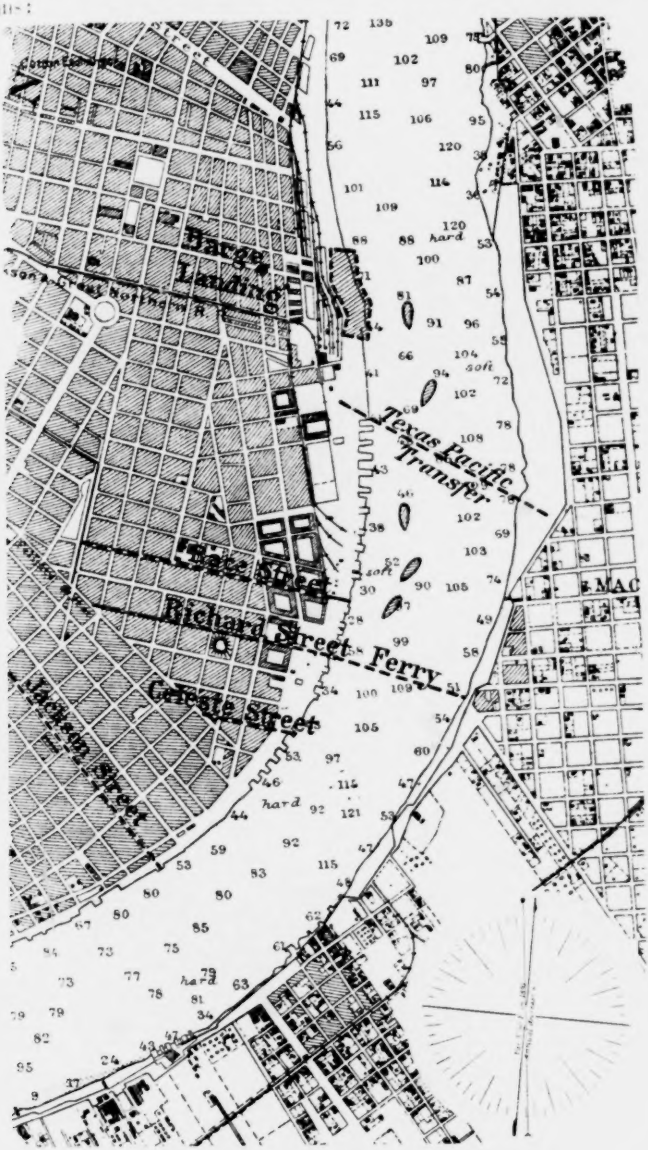
and were secured in the positions thus indicated, being made fast to each other and to the "Future City." The tow thus made up was about 607 feet in length and about 175 feet in breadth. The barges were each 225 feet long, 10 feet hold, and 36 feet beam, loaded to their fullest capacity.

VI.

The "Future City" and the barges comprising her tow were all staunch, sound, and seaworthy, and were fully and adequately manned, officered, and equipped, and the "Future City" was amply powerful and able to handle her said tow under any and all circumstances arising in the navigation of the Mississippi River. Steamers like the "Future City" could safely handle fifteen loaded barges, 1,000 feet in length, as one tow.

VII.

The following is a diagram of a map of the portion of the Mississippi River at and immediately above the barge landing of the port of New Orleans:



11 The bend in the river to which the tow proceeded in beginning preparations to land was in the vicinity of Louisiana avenue, near which was a building known as the "elevator." This elevator does not appear on the diagram for the want of space, but it is 2 miles from the barge landing and about 1 mile from where the "Atlanta" lay. While descending, and having passed the elevator, and above Jackson street, a sudden rain, accompanied with high wind and thunder, came up, which lasted five minutes, but when the tow reached Celeste street the rain had ceased and the wind had subsided. The blow did not affect the navigation of the tow or the control of the barges by the "Future City."

VIII.

On May 7, 1888, nothing worthy of note having theretofore occurred during her said voyage, the "Future City," with her tow, was descending the Mississippi River and was approaching the port of New Orleans, with the intention of making a landing at the wharf indicated upon the said plat as the "barge landing;" and while so descending the said river the "Future City," following the proper and customary course of navigation for descending towboats with tows, well recognized and followed as such by pilots and other persons engaged in navigating the Mississippi River, ran in close to the New Orleans or western shore of the river at or about the elevator, and thereupon commenced backing, which brought her and her tow into a flanking position, nearly at right angles to the current of the river, her bow and tow extending out into the river and quartering downstream and her stern as close to the western shore as safety would permit. In this position, and still following the proper and customary course of navigation for towboats with tows, she floated downstream with the current until she reached and rounded the point of land that makes out into the river from its western side at Celeste street, as indicated upon the plat set forth in Finding VII. Her rate of speed was about five miles an hour (being somewhat slower than the current), and she was backed occasionally to check her headway, and also to hold her stern as close to the western shore of the river as possible without endangering collisions with the shipping moored along its banks. The object of towboats with tows in adopting such a course is to avoid currents of the river, which sweep from the western toward the eastern shore in that locality, and which would carry heavily laden barges out into stream and into the usual and customary track of steamboats and other unimpeded vessels. While the tow was proceeding to the landing a steamer known as the "Mabel Comeaux" approached from below, giving one blast of her whistle, so that the "Future City" might know of an intention on the part of the pilot of the ascending steamer to keep to the side nearest the city and that the tow must get out of the way. The signal from the ascending boat was answered by the "Future City," and accordingly the tow was pushed out in the stream far enough from the shore to admit of the safe passage of the "Mabel Comeaux" next to the New Orleans side. The ascending steamer and descending tow passed each other in safety between the elevator and Celeste street. The change of the tow's course (to permit the steamer to pass) was not appreciable.

IX.

Prior to rounding the point of land at Celeste street a towboat, with a tow bound for the port of New Orleans and pursuing the proper and customary course of navigation for such vessels as aforesaid, can not make out and see vessels and other objects lying in that portion of the river below the said point of land and between the western shore and the middle of the stream, because that point and the buildings standing upon it and the shipping moored along its banks intervene and completely shut off the view in that direction.

Upon rounding the said point of land at Celeste street, and when she had reached a place about opposite Richard street, the "Future City" for the first time sighted and discovered five United States vessels, to wit, the "Atlanta." "Galena," "Ossipee," "Yantic," and "Richmond," lying at anchor below the said point of land and between the western bank of the river and the middle of the stream. The "Future City" could not have made out and discovered the United States vessels before, because the said point of land intervened and, with the buildings standing upon it and the shipping moored along its banks, completely shut off the view in the direction of the portion of the river where those vessels lay at anchor. The United States vessels as they then lay at anchor were ranged in an irregular line in the order named along the western bank of the river, which is the city side, their distances from the said bank varying from 500 to 700 feet. The "Atlanta" was anchored highest upstream and was about 150 yards below the Richard street ferry and sufficiently far to extend the entire fleet down the river for the distance of about 1 mile, the "Richmond" lying off and about opposite the barge landing. At Celeste street the shore extends into the river to a sharp point and the river bends from that point to the north. Just below the width of the stream is about 1,800 feet. The location of the "Atlanta," 600 feet from the New Orleans shore, or a little less, put that vessel in the track of tows entering the harbor from above. It was in the pathway of a tow of even less length than plaintiff's, at that particular place engaged in flanking down to the landing, because of the necessity for any tow trying to land to push out into the river to round the point opposite Celeste street. The upper vessel was at the entrance to the harbor, and the fleet located in the way of all vessels descending and seeking to land in the neighborhood of the barge landing. The positions of the vessels were substantially as indicated upon the plat. When the United States vessels were first sighted or discovered by the "Future City" the "Atlanta" was distant from her about 150 yards.

XI.

The positions occupied by the said United States vessels on May 7, 1888, as aforesaid, were directly in the track of towboats with tows descending the Mississippi River bound for the port of New Orleans and pursuing their proper and customary course of navigation, and were thus directly in the track or course which the "Future City" and her tow were pursuing when she first cited and discovered them as aforesaid.

13

XII.

The positions occupied by the United States vessels on May 7, 1888, as aforesaid, were improper and unusual, by reason of their being higher upstream, too short a distance below the point of land at Celeste street, not at the bank, but nearer to the New Orleans or western shore in the river, than the proper, usual, and customary anchorage grounds for such or other vessels, or than vessels had ever before been known to occupy while at anchor. By reason of their being anchored so high up the river such short distances below the point of land at Celeste street and so close to the New Orleans shore, and by reason of their swinging at anchor, as aforesaid, they rendered the navigation of the river by towboats with tows, pursuing their usual and customary course, hazardous and extremely dangerous.

XIII.

On May 7, 1888, and prior thereto, there was an abundance of good and suitable anchorage ground lower down the river and nearer its eastern or Algiers shore, where it was usual, customary, and proper for vessels to lie at anchor while at the port of New Orleans, and where the United States vessels could have lain at anchor in perfect safety and without rendering the navigation of the river at the port of New Orleans either hazardous or dangerous for any vessels pursuing their usual, proper, and customary courses. Good holding ground for vessels like the men-of-war to safely anchor at all times existed within 20 feet of the Algiers shore.

XIV.

The United States vessels came to anchor in their said positions on or about May 5, 1888, while the "Future City" with her tow was descending the Mississippi River on her voyage from St. Louis, and none of her officers or crew had notice or knowledge of their presence at New Orleans or of their positions or whereabouts or of the manner in which they were anchored until they were sighted and discovered after the "Future City" had rounded the point of land at Celeste street as aforesaid.

XV.

After rounding the point of land at Celeste street a towboat with a tow descending the river and bound for the port of New Orleans, and pursuing the proper and customary course of navigation for such a vessel, would continue to float downstream with the current, still in a flanking position, and with her stern as close to the shipping moored along the western bank of the river as safety would permit, until she reached a position a suitable distance above the "barge landing," where, taking advantage of the slack water, she would back hard, check her headway, and make her landing with her bow and tow downstream, on account of the eddy.

XVI.

As soon as she sighted and discovered the said United States vessels lying at anchor in her usual and proper course as aforesaid the "Future City" backed under a full head, working full stroke, with all the power she had, thus adopting the only course feasible and proper under the circumstances or in anywise calculated to prevent her from coming into collision with the said United States vessels. Her object in so doing was to check her headway and straighten up or bring herself and her tow into a position broadside on to the shore and as close to the New Orleans shore as she could and yet escape collisions with the shipping moored thereabout. The width of her tow being about 175 feet, the "Future City" could have passed between the said United States vessels and the New Orleans shore had there been sufficient time and space for her to so check her headway and straighten up. On account of the insufficiency of time and space after she sighted and discovered the United States vessels as aforesaid, owing to the "Atlanta's" being anchored immediately below the point of land at Celeste street and close to the New Orleans shore, and notwithstanding that the "Future City" made every possible effort to keep clear of the United States vessels, and in order that her tow might extend out into the river as short a distance as its length would permit backed her stern as close to the New Orleans shore as it was in anywise possible without coming into collision with the shipping moored thereabout, and notwithstanding that she was skillfully and properly handled and managed by her officers and crew, she was unable, on account of the short distance intervening, either to check her headway or to straighten up, and still being in a flanking position, she and her tow were carried by her headway and the current of the river and barge "73," the lead barge of her tow, on the port side, came into collision with the "Atlanta," striking against the ram of that vessel broadside on with great force. As a result of this collision barge "73" was cut down and sank, with all her cargo on board, and she, together with her freight earnings, became a total loss to the claimant. Thereafter, notwithstanding that the "Future City" continued to pursue the only course feasible and proper under the circumstances and in anywise calculated to avoid further collisions with other of the United States vessels, and continued to back with all her power, and notwithstanding that she was skillfully and properly handled and managed by her officers and crew, yet her stern having been swung slightly downstream by the collision of barge "73" with the "Atlanta," she was unable to check her headway or straighten up, and was carried by her headway and the currents of the river, and went down toward the "Galena," which was lying about 400 feet astern of the "Atlanta" and closer to the New Orleans shore than the latter. In the collision between barge "68" and the "Galena" the lines and fastenings of the said tow and the rigging of the "Future City" were parted or greatly damaged and her tow was broken up and the lead barge on the starboard side struck the "Galena" and was sunk, with all her cargo on board, and the barge and her freight earnings became a total loss, and notwithstanding that she was skillfully and properly handled and that she and her officers and crew did their utmost to control her remaining barges and to prevent further collisions between them and

the United States vessels, barge "50" broke loose and was carried by the current and came into collision with the U. S. S. "Richmond," which was lying at anchor directly opposite the "barge landing," and about 300 feet therefrom, and thereby barge "50" sustained great damage and the loss of part of its cargo. The loss sustained by the claimant as a result of the said collisions was as follows:

15	Barge "No. 68," total loss		$6,500.00
	Barge "No. 73," total loss		6,000.00
	Freight earnings, barge "No. 68"		2,832.50
	Freight earnings, barge "No. 73"		2,844.88
	Repairs to barge "No. 50"		1,250.75
	Damage to rigging to towboat "Future City:"		
	6 pair blocks, at $4.90	$29.40	
	3,055 pounds line, at 11½ cents	351.22	
			380.72
	Total		19,808.85

XVII.

In the navigation of the Mississippi River it is the custom of ascending steam vessels to navigate near the points and descending steamers, if without tows, to run the bends; that is, the ascending steamers hug the starboard shore, while the descending steamers navigate to the right of those ascending the river. The navigation of tows vary. They are sometimes run across from point to point and then run around the point, but sometimes in turning a point down they are held in the same course and do not cross at all. The course is governed generally by the difference in the river at different places. There is a clear and well-defined custom at New Orleans respecting the course and practice of tows to land. Descending tows come close in to the shore on the city side of the river. If they did not pursue this course descending tows would come down in the current so far out that the motive power could not back the tow to land. One of the reasons for coming in close to the shore is to catch the slack water near vessels anchored to the shore.

XVIII.

At all times hereinafter mentioned there existed at and for the port of New Orleans, in the State of Louisiana, a board of five harbor masters, duly appointed and acting according to law, of which John Brewster was duly elected and acting chairman.

XIX.

Among the duties with the performance of which the aforesaid board of harbor masters are charged by the laws of the State of Louisiana is that of "regulating and stationing all vessels in the stream of the river Mississippi, within the limits of the port of New Orleans, and at the levees thereof." The said laws of Louisiana further provide for the imposition of a fine of $50 upon "any master or other person who shall oppose or resist any harbor master in the execution of the duties of his office."

XX.

The following is a correct copy of the proceedings of the said board of harbor masters:

Minutes of meeting held June 15, 1884.

OFFICE BOARD OF HARBOR MASTERS,
Port of New Orleans, La.

Present: Messrs. R. W. Adams, John Brewster, and M. J. Sheehan, who presented their commissions as duly appointed harbor masters of the port of New Orleans. Mr. Adams in the chair. Upon motion duly seconded Mr. Adams was elected secretary and treasurer; Mr. John Brewster, president. Also moved and seconded that A. C. Noreroo, clerk of former board, be retained.

The following apportionment of districts was then made: Mr. John Brewster, second and third districts; Mr. M. J. Sheehan, fourth; Mr. H. Cain, first and fifth.

On motion of M. J. Sheehan, duly seconded, the following rules and regulations were adopted by the board:

1. The harbor masters have authority by law to regulate, moor, and station all seagoing or coasting vessels at the levee and to remove them from time to time to make room for others, and of the degree of accommodation which one vessel shall afford another the harbor master is constituted sole judge.

16 2. Vessels coming to the levee must have their yard braces sharp up by the starboard braces, their port anchor on the forecastle, and their starboard anchor cocked, billed, and ready to let go.

3. Any person cutting or interfering with the moorings of any vessel will be punished according to law.

4. Any person throwing ballast, rubbish, or anything that will sink into the river will be punished according to law.

5. The heating of pitch, tar, or rosin is strictly prohibited on any vessel lying at the levee.

6. All jib booms shall be rigged out unless by permission from the harbor master.

7. All vessels arriving at this port shall notify the harbor master of the district or leave word at the central office, where the place of landing will be designated; otherwise [they will be] removed at the expense of the vessel.

8. No vessel shall change her berth without permission, and all vessels ready for sea shall give reasonable notice to the harbor master so that there may be no cause for complaint.

9. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence, besides laying themselves liable under the law.

By order of the board of harbor masters:

JOHN BREWSTER, *President.*
R. W. ADAMS, *Secretary.*

XXI.

Upon the arrival of the war vessels in May it does not appear that the harbor master was notified of the fact, nor was word left at the central office that the said vessels had arrived. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet and was without knowledge of the places taken in the river by the said war vessels.

XXII.

The said collisions were the result of negligence on the part of the officers in command of the said United States vessels in bringing them to anchor in improper and unusal positions, and in causing them to be anchored on swinging chains, as aforesaid.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment in the sum of $19,808.85.

17 V.—*Opinion of the court.*

HOWRY, J., delivered the opinion of the court:

This suit has its origin in a marine collision, or series of collisions, on the navigable waters of the Mississippi River, in the port of New Orleans, between towboats propelled by a steamer called the "Future City," belonging to the plaintiff company, and war vessels belonging to the United States. The gravamen of the action is the negligence of the naval officers in command of the vessels, and damages are claimed for the total loss and destruction of two of the towboats and for the amount expended in repairing a third barge as the result of the collision, and also for the amount of the freight earnings lost in consequence of the collision, the whole damages claimed being $24,308.85.

Jurisdiction to hear and determine to judgment the claim was conferred upon this court by an act of Congress approved August 3, 1894 (28 Stat. L., p. 219), in the following language:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the legal or equitable owners or claimants of the steam towboat 'Future City,' her barges in tow, cargoes thereon, freight, and personal effects contained in them alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war 'Atlanta,' 'Galena,' and 'Richmond,' in the Mississippi River, at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal, as in other cases: Provided, That no suit shall be brought under the provisions of this act after six months from the date of the passage thereof: And provided further, That no judgment shall be rendered against the Government unless it shall affirmatively appear, from the evidence

adduced, that such collision was the result of negligence on the part of the officers in command of said vessels of war."

The first question is the character of the special act under which the case has been referred and the rules which must govern in determining the rights of the parties. The claimant contends that the rules observed by all courts of law, equity, and admiralty where negligence is charged shall obtain. The defendants, on the other hand, contend that the last proviso to the jurisdictional act establishes rules materially different from those which obtain in admiralty courts; that the additional proviso was intended to compel the plaintiff to prove the negligence of the officers of the war vessels beyond any reasonable doubt; that, even if the collision was the direct and proximate result of the negligence of the officers mentioned, yet if the moving craft of the plaintiff was guilty of any negligence whatever that contributed to the disaster the plaintiff can not recover.

18 Without statutes conferring jurisdiction the courts have no authority to consider cases of wrong arising in maritime collisions caused by Government vessels, inasmuch as the United States are not liable for the torts of their officers or agents except as they consent to be. But Congress have repeatedly recognized the obligation of the Government to compensate for injuries occasioned by the negligence of its agents. The legislative authority has been invoked time and again to give redress in some form or other, and this court has been used as the instrument of Congress in dealing with such cases. (Sampson v. United States, 12 C. Cls. R., 480; Jane Carroll et al. v. District of Columbia, 22 C. Cls. R., 104; Joseph Irwin v. United States, 23 C. Cls. R., 154; Walton et al. v. United States, 24 C. Cls. R., 372.)

The principle on which liability rests in cases of a similar character is the same as that which at common law obtains between private persons. This principle was well stated from the Committee on Claims by Mr. Lanham in a report to the Fiftieth Congress to be the responsibility of the property owner for the management and use of his property. That report was made to compensate certain claimants for the loss sustained by them in the destruction of their property as the result of the negligence of Government agents in omitting to place a proper and customary light on a pier which the Government was constructing on a navigable river, and resulted in the passage of an act which brought the matter to this court for determination. The direction was simply given there "to hear and determine" the claim to judgment, with the right of appeal, as in other cases. (Walton et al. v. United States, supra.) The act referring the present case provides that no judgment shall be rendered against the Government unless it shall affirmatively appear from the evidence that the collision was the result of negligence on the part of the officers in command of the war vessels. This requirement imposes upon the plaintiff the duty of affirmatively showing the negligence of the officers mentioned to have been the proximate cause of the collision. Without this there can be no recovery. Liability is neither increased nor diminished by the proviso.

The act does not impose upon the plaintiff the burden of establishing the negligence of the officers of the war vessels beyond any reasonable doubt. Crime is not the issue, and the rule invoked has no application

in a civil action where mere negligence is charged and tort is the gravamen of the complaint. The requirement is fully met if the claimant satisfies the court that the negligence of the officers was such as to cause the collision without any corresponding negligence on the part of those in charge of the tow directly contributing to the result. The thing intended is legal relief for acts of negligence resulting in injury to the plaintiff; redress of wrongs for which compensation will be made when proved. The matter of negligence being thus submitted, qualified only as to how it must be made to appear, the last proviso invested the plaintiff with all such rights as existed at common law in determining liability in cases of a similar character between others. The restrictive words, if they may be called such, are unappreciable because it is just as much the duty of the plaintiff to affirmatively show the negligence of the defendants without them as it is with them.

Ordinarily, it is a sufficient defense to show that the plaintiff himself was guilty of negligence that contributed to the injury. If the
19 defendants, their negligence being established, allege that plaintiff's officers or servants were negligent and contributed to the injury, then the burden of proof rests upon the defendants to show that the plaintiff was also negligent and to such an extent that their conduct directly contributed to the injury. This rule has been declared to be in accord with the uniform course of decision in the Supreme Court. (Inland and Seaboard Coasting Company v. Tolson, 139 U. S. R., 557, and authorities cited.) These decisions have been followed by another, which declares that where the facts make the same applicable there is a qualification to the rule respecting negligence of the plaintiff, in that the contributory negligence of the plaintiff would not exonerate the defendants if the defendants by the exercise of reasonable care and prudence might have avoided the consequences of plaintiff's negligence. (Grand Trunk Railway v. Ives, 144 U. S. R., 408.)

The admiralty rule of an equal division of damages in the case of collision between two vessels when both are in fault contributing to the collision has long prevailed in England and this country. ("The Max Morris," 137 U. S. R., 1.) But at common law the general rule is that if both vessels are culpable in respect to faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. (Atlee v. Packet Co., 21 Wall., 389; Belden v. Chase, 150 U. S. R., 691.) Therefore, under the terms of the special act in this case the damages can not be divided, even if the proof establishes direct mutual fault. The plaintiff is entitled to all the damages proved to have been sustained or to nothing.

For the purposes of this case, then, it is sufficient to say that if contributory negligence clearly appears on the part of the plaintiff, of such character as directly produced the result, the plaintiff can not recover; but any mismanagement of the tow or mere mistake of judgment on the part of her officers and crew at the critical period in the history of the collision, not the direct and proximate cause of it, will not relieve the negligence of the defendants. Where the fault on one side is flagrant and the other so trivial as to leave it doubtful whether there was fault on the latter's part or not, the benefit of the doubt must be given to the vessel charged with contributing to the injury. ("The Grace Girdler," 7 Wall., 196; "The

Great Republic," 23 Wall., 20; Spencer Mar. Col., 338.) And if the fault of the one vessel is established sufficiently to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. ("The City of New York," 147 U. S., 72.)

The plaintiff's case is that the collision (there were several collisions, but as they all happened about the same time and from the same cause we will deal with them all as one collision) resulted from and was occasioned by the negligence of the officers in command of the United States vessels in bringing them to anchor (1) in improper and unlawful positions and in an improper manner, and (2) in remaining at anchor in such positions and in such manner.

A vessel in motion is bound to avoid one lying at anchor as far as it can do so.

The plaintiff's tow being in motion, the presumptions are with the defendants in fixing the blame. But these are mere presumptions, which can not be allowed to prevail against the ascertained and established facts. (Fresh v. Gilson, 16 Pet., 327; Lincoln v. French, 105 U. S. R., 614.)

20 If a vessel at rest is moored in an unlawful situation the burden of proof is upon it to show that the collision did not occur by reason of its exposed or unlawful situation (Spencer Mar. Col., sec. 120), but that it did occur by reason of the negligent conduct of the plaintiff.

Where one vessel, clearly shown to have been guilty of a fault adequate in itself to account for a collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. (The "Oregon," 158 U. S., 187.)

With these principles in view, the questions respecting the negligence of the vessels arise on the findings, which determine the legal consequences.

The United States vessels were ranged in an irregular line below a point of land opposite Celeste street, the "Atlanta" being highest up the stream and two squares below the Richard street ferry. The "Galena" was next to it below; then, in the order named, the "Ossipee," the "Yantic," and the "Richmond," the latter being at a point somewhat above but nearly opposite the barge landing.

The vessels were apart sufficiently far to extend the entire fleet down the river for the distance of about 1 mile. At Celeste street the shore extends into the river to a sharp point, and the river bends from that point to the north. Just below, the width of the stream is about 1,800 feet. The men-of-war were lying along the western shore of the river at distances ranging from 500 to 700 feet. The location of the "Atlanta," 600 feet from the New Orleans shore, put that vessel in the track of tows entering the harbor from above. It was in the pathway of a tow of even less length than plaintiff's at that particular place engaged in flanking down to the landing because of the necessity for any tow trying to land to push out into the river to round the point opposite Celeste street. The upper vessel was at the entrance to the busy part of the harbor, and in its entirety the fleet was located in the way of all vessels descending to the neighborhood of the barge landing.

On the part of the defense we are referred to some authorities which, it is claimed, tend to show that the anchorage taken was not improper. (The "Indiana," Abbott's Admy. Rep., 330; The "Ceuelberg," 3 Wood's Cir. Ct. Rep., 32; The "Ogemaw," 32 Fed. Rep., 920; Culbertson v. Shaw, 18 How., 585, noticed later on.) Without noticing these cases in detail, it is enough to say that they do not prove the right of one vessel to unnecessarily get in the track of others at points where, from the nature of things, collision is nearly inevitable to those trying to enter a harbor without knowledge of the anchorage of other craft in improper and dangerous positions.

The law of the road is well-nigh universal. It applies with greater particularity, if anything, to the thoroughfares of rivers and the sea than to land. Intended for the free and unrestricted use of all, roadways are expected to be kept open. Ordinary prudence and caution suggest that none shall unreasonably stop in the pathway; or, if by chance this be done, that the improper position so taken be abandoned as early as practicable. So necessary to the safety of travel is this rule, obstructions in navigable waters within the States are dealt with as nuisances and indictable as offenses against the laws. When, in disregard of the
21 rights of others, vessels negligently and carelessly come to anchor in the track of passing vessels, the owners of such craft must be held responsible for the consequences. Government agents can no more be exempt from the requirements imposed upon private individuals in this regard than persons without such responsibility. Sound public policy, as well shown by an able report of a Senate committee on this subject once submitted by Senator Hoar, requires the United States and all sovereign Governments to hold themselves responsible for injuries where the private rights of the citizen have been violated by the negligence of public officers. The common injury occasioned to a private person by the carelessness of the driver of a mail wagon or other vehicle passing through the street and engaged in the business of the Government has been thought to be the subject of responsibility upon every consideration of public policy and justice. Cases of injury occasioned by Government agents on the water are peculiarly within the rule of responsibility. (Cong. Rec., 50th Cong., 1st sess., part 1, 465.) The rules of navigation are ordained and required to be observed to save life and property employed in marine pursuits, and not to promote collisions or to justify the wrongdoer where disasters occur. (The "Sunnyside," 91 U. S., 210; The "Hasbrouck," 93 U. S., 406.)

The abstract right of the Government's officers to run the vessels in their charge anywhere in our navigable streams and come to anchor in harbors is just as great as the right of other vessels to do the same thing. The only difference that can be suggested in this respect consists in the privilege of place of anchorage. Those possessing slips or wharfage rights (usually obtained for a consideration) may occupy such places to the exclusion of others, but the rights of all are the same in using the harbor, subject to the rules and regulations prescribed by proper local authority and the rules of navigation in approaching and leaving its waters. When a vessel has committed a positive breach of a rule she must show, not only that probably her fault did not contribute to the disaster, but that it could not have done so. (The "Pennsylvania," 19 Wall.,

125, 136; Richelieu Navigation Co. v. Boston Ins. Co., 136 U. S., 422; Belden v. Chace, 150 U. S., 699.) This rule may be considered of proper application in a case where, in positive disregard of local authority, masters of vessels have stationed them where injury was done to those unaware of their presence.

The authorities relating to the anchoring of vessels in positions where proper and customary navigation is rendered more difficult and dangerous or where such anchorage adds to the difficulties existing and produced by natural causes, impute negligence and culpability to those coming to anchor in such places under such circumstances. Thus, it is negligence for a vessel to anchor so near the entrance to a harbor that shipping, entering in stress of weather, is liable to become embarrassed by its presence; and where the usual difficulties of navigation make the entrance to a harbor a dangerous undertaking it is especially reprehensible for a vessel to moor in a situation tending to increase those difficulties. (Spencer, Mar. Col., sec. 99, and authorities cited.) So, if a vessel is at anchor in a proper place, but is observant of the precautions required by law, it is not liable for damages sustained by a vessel in motion colliding with it; but where it anchors in an unlawful position or fails to observe the statutory requirements and such other precautions as good
22 seamanship suggest it must suffer the consequences. (Ibid., sec. 106; The "Jeremiah Godfrey," 17 Fed. R., 738; Strout v. Foster, 1 How., 89; The "Buffalo," 55 Fed. R., 1019; The "John H. May," 52 Fed. R., 882.) Liability for getting in the way of an entrance to a harbor, whereby a moving vessel was injured, was distinctly recognized by the Supreme Court in the case of the Brig "James Gray" v. The Ship "John Fraser" (21 How., 187), where a vessel was being towed into port by a steam tug and came into collision with a vessel at anchor in the thoroughfare at a place where vessels bound out usually anchored for a short time to make final preparations for sailing on their voyage. While the vessel at anchor was not held liable on the ground that the lax execution of the regulations of the port had become a usage when the harbor was not overcrowded and the harbor master had acquiesced in single vessels anchoring in the thoroughfare, and the interpretation of the ordinance of the local authorities could not be more rigidly interpreted and enforced by the courts than by the authorities themselves, yet the decision lends emphasis to the general rule and settles it.

Being without anchorage grounds of their own, it was the duty of the commanders of the war vessels, if they had control of the matter, to anchor with reference to the conditions existing in a busy harbor, not merely for the protection of the Government property in their charge, but for the safety of others. The vessels did not anchor at any wharf, but did stop at unusual places in the river directly in the pathway all vessels necessarily had to take to make their landings, and remained there for two days and until the collision, although there was plenty of room elsewhere in the harbor. Good holding ground for vessels to anchor at all times existed within 20 feet of the Algiers shore and out of the way of vessels coming to port.

If the anchorauge selected was safe and proper for two days, it was so for a longer time, and if there was nothing improper in the selection, then vessels of every kind had the right to anchor in the same positions

and places at every opportunity. The "Richmond" must have been very much in the way of all vessels passing to or from the city side of the river with knowledge of her position; while to those without knowledge of it or to those navigating in the fog her position was extremely dangerous. No tow could make a landing in that vicinity while the "Richmond" remained in her position. The entire fleet was a source of danger to unwary shipmasters coming into the harbor both from above and below. The "Atlanta," just below the head of Celeste street, was more directly in the way of descending boats than the others. From her peculiar position she was consequently more difficult to pass by vessels coming from above than the other ships, and more dangerous to them than at any other anchorage that might have been selected. All the ships were anchored with a single chain and swinging to some extent.

23 When war vessels visited the port of New Orleans on occasions previous to the collision they anchored from Canal street down to the custom-house, or in that vicinity, but on no occasion or at any time were they ever anchored just below the bend of the river near Celeste street, as in this instance.

Immediately below and under the point on the Algiers side of the river, above which there was a convenient, safe, and proper place for vessels to anchor, there is a strong eddy. Vessels coming from the south all come through that eddy, striking the current at the point; then they headquarter over to the city side close along the shipping to make their landings. Thus, the men-of-war were in the passageway of the customary route of ascending vessels seeking to land at any point above the location of the "Richmond." The danger to an ascending boat would not be so great as to one descending, as an ascending boat could check its headway at will, but with a descending boat engaged in the attempt to land opposite or just below the anchored vessels with head downstream, there would be an apparent necessity for such boat to keep close to the landing shore to avoid the currents and eddies that would carry the boat trying to land either down or across the river.

The places selected by the men-of-war to stop made them more dangerous to passing vessels than if such vessels were steaming in the harbor. So much more dangerous may a vessel lying motionless on the water sometimes be over one under way, it has been held that a vessel may be at fault for lying still in the water only a minute and a half. (The "Brittania;" The "Beaconsfield," 153 U. S., 130, 137.) Fault was found, it is true, in such a case where it was expected that a vessel would move forward and where it was thought by the court such vessel was under obligation to do so, but the authority is cited to show that under particular conditions and emergencies there is greater danger in the want of motion than in moving. The "Atlanta" was more dangerous anchored as she was than she would have been if moving, because with steam on and in motion she could have done her part in keeping out of the road if ascending in an improper part of the river.

On account of the irregular, or what the witnesses call the zigzag, position of the fleet the difficulties and dangers of entering the harbor were aggravated. The irregular line occupied by the fleet caused the ships to present an extensive front. If they had been moored in customary places, no blame could attach to the ships' officers, because such

situations were those where vessels were expected to be. Approaching boats are always supposed to be on their guard against the known places of anchorage for shipping, but the case before us discloses locations by the men-of-war too far away from the New Orleans shore to admit of boats trying to go there to calculate upon passing to their right upon entering the harbor from above, and yet too close to the city side of the river to make the attempt to go between absolutely safe.

24 If to take an unlawful position means anything; if to get in the way and unreasonably stop carries any consequence; or, if disregard of statutory requirement has application where damage ensues to others, then this case must be ranged with those where vessels are guilty of culpable negligence in anchoring in the common passages of great thoroughfares. The ships were at the entrance and in the immediate harbor and in the way of others. All classes and sizes of water craft have the right to follow usual channels. (Sherlock v. Bainbridge, 41 Ind., 35; Wood's Cir. Ct. Rep., 16.) None possess the right to block these channels.

Necessity alone excuses vessels which are moored and lie in the channel or entrance to a port. "The Scioto," 2 Ware, 360; Martin v. Five Canal Boats, 24 Fed. Rep., 500; The "Margaret J. Sanford," 30 Fed. Rep., 714; 63 Fed. Rep., 1020.)

The number of the ships increased the chances for collision with those unaware of their presence at places never before taken, and their size and weight made them more hazardous to those navigating in their midst. If securely anchored, they were planted like great rocks in the river without necessity; if by single chains, the dangers were greater with less necessity.

For this, who was responsible?

At the time of the collision there existed at the port a board of five harbor masters, duly appointed and acting according to law. Among the duties they were charged to perform by the laws of the State of Louisiana, the duty of regulating and stationing all vessels in the stream within the limits of the port and at the levees thereof was imposed. Any master or other person opposing or resisting this board in the execution of the duties imposed upon them by law was subject to fine. The Mississippi River at New Orleans is entirely within the confines of the State of Louisiana. The jurisdiction of the board of harbor masters over the water front extends along the Algiers shore. (Pickles v. Dry Dock Co., 38 La. Annual, 412.)

The chairman of the board of harbor masters, who was introduced as a witness for the Government, disclaims, or attempts to disclaim, on behalf of the board, any control over vessels of the Navy, on the ground that such vessels pay no duties, and have the right to come and go as they please. Ships of the Navy have the right in time of war or peace to go anywhere in navigable waters pursuant to Government orders. But in time of peace they are as much subject to the reasonable rules and regulations adopted for the safety of all the shipping using a harbor consistent with their own safety and duty to the Government as others. The board of harbor masters at the port of New Orleans had the power and authority to prescribe where vessels might lie in the harbor. An ordinance of this kind embodying other similiar regulations is not in conflict with any law of Congress regulating commerce, and is therefore

valid. (Owners of brig "James Gray" v. Owners of ship "John Fraser" et al., 21 How., 184.)

The findings show that the harbor master exercised no personal supervision over the matter of the anchorage of the fleet, and was without knowledge of the places taken in the river by the fleet; but they also establish that it does not appear that upon the arrival of the war vessels in the harbor that the harbor master was notified of the fact, nor was word left at the central office that the said vessels had arrived pursuant to the rules regulating the anchorage of vessels in the river. The commander of the fleet may not have known what the regulations of the port were, but it was his duty to inquire; and if he anchored his ships contrary to the regulations existing for the anchorage of all vessels in the harbor, the defendants assumed the consequences.

But was the tow free from fault? And what, if any, is the degree of this fault?

There are authorities which hold that, under given circumstances, it is the duty of tows coming to a part of the river in which there are obstructions to navigation to lie by and divide up the tow before atttempting to land. In the case of The "Syracuse" (12 Wall., 167) it was held that a steamer having a very large tow and approaching a place where, from the number of vessels in the water and the force of the countercurrent, navigation with such a tow is apt to be dangerous, but with a small one less so—a place, for example, like that near the Battery, New York, where the East River and the Hudson meet—is bound to proceed with great care, and if within 2 or 3 miles of the place, though not nearer, she can divide her tow, she is bound to divide it. The "Syracuse" had a tow of 40 boats. Within a mile or so of the Battery that part of the harbor was seen to be full of vessels; to the view of the captain there seemed to be but one passage through which the tow could be taken; the tide was ebb, setting south in the North River, but above Governors Island setting sharply to the west and southwest as it came out of the East River, so that the tow coming down the North River had the tide with her, but as she turned into the East River had to meet an ebb tide coming from the east nearly at right angles, while many vessels were lying at anchor all around. Of necessity the rear end of a long tow would be swept well around. The boat that was injured was at the rear end of the tow and a part of it. In deciding the case the court (after commenting on the omission of the master of the tow to stop above, as he had been doing at night with previous tows, and that it was easy to tell at the distance of a mile that the river at the Battery was full of vessels and at ebb tide dangerous to navigate through with such a fleet) said the master, under these circumstances, should have remained at the point of observation until the tide had slacked, or have divided the tow.

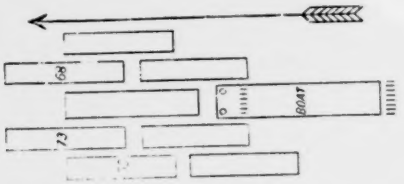
In the case of the "Mohler" (23 Wall., 230) the weather was boisterous and the boat laid up on account of the wind. The weather had not cleared nor the direction of the wind changed when the boat resumed her journey. Being forewarned, the court held that the master should not have undertaken the passage of the river between two piers where, on account of the high and uncertain wind, there was danger of collision with one of the piers. It was consequently declared to be the duty of the master to lie by until the wind had gone down.

In the case of Nicholson v. The "Adams" (28 Fed. Rep., 889) it was held to be negligence for a tug to tow a large and deeply laden schooner up a narrow channel during the prevalence of a hard storm, with its sails unfurled and in such a condition as to cause the vessel to become unmanageable, whereby a collision occurred.

These cases speak for themselves. The facts in them differ materially from the circumstances shown to exist here. They mean in their last analysis that in the face of danger and with full knowledge of its existence masters of towboats shall not needlessly take risks that might well be avoided by timely precautions, and in no event must do so against the requirement of any law or the rules generally adopted for the safe landing of tows.

We can well understand the necessity for the division of tows and the consequent duty of masters to break them up and carry them to particular places in sections, where, from the number and size of the barges, navigation is rendered less difficult and dangerous than if held together and propelled as one. We know of no rule on the subject save that which good seamanship and a proper regard for the rights of others and their own safety would suggest. Where channels are very narrow it is quite common for steamers with barges to stop and take them through one or two or more at a time, according to the emergencies of the time and place. But with an open river and a proper current they are generally kept together, according to the ability of the towboat to handle the barges in safety. The larger the tow the greater the difficulty of handling them, of course, but eight barges make a medium-sized tow; and steamers like the "Future City" could safely handle fifteen loaded barges of 1,000 feet in length. Those carried by the "Future City" were all staunch, sound, and seaworthy, fully and adequately manned, officered, and equipped, and the steamer wanting in nothing to perform its work. Other towboats possessing less power were in the habit of conveying larger tows down the river and landing them at New Orleans, without division, over the precise course adopted by the plaintiff. Unless towboats were propelling large barges laden with coal, where thirty or forty constituted the tow, it was not difficult to avoid collision in attempting to land. The arrangement of the barges about the steamer is shown by the following diagram:

26



The tow thus made up was about 607 feet in length and about 175 feet in breadth.

It was not customary to divide tows in landing them at New Orleans. They were carried in safety to the port as one. If we should declare, then, that tows should be divided, what sort of a division must it be? Into how many parts must one tow be separated? And shall the courts decide for river men and pilots what the laws and the rules of navigation

have omitted to do in this respect? If experience had proved the safety of the course adopted in this instance, and usage had sanctioned it as free from danger to passing vessels or those anchored at their usual places in the harbor, then the question as to whether the tow should have been stopped at a reasonably safe distance before commencing to land and broken up must depend upon the ability of the towboat to handle her barges against expected dangers in safety to the place of landing under such circumstances as wind and tide and other causes may create at the time.

Was it incumbent on the tow to first sight the harbor before making preparations to land in the accustomed manner? If so, the right of tows to land at New Orleans at the places they have a right to go without being first divided must be denied, inasmuch as the current that is shown to set in to the Algiers shore at the place where the harbor comes in full view to those descending the river would carry tows into the bank on the side opposite the landing or far down the river. None in charge of a tow have the right to take chances between two courses—the one of safety and the other involving possible collision—by abandoning the safe for the more hazardous course. But every preparation to land in the usual way had been made, and the elevator had been passed as the "Future City" was attempting to place her barges at the proper place on the river below. Then the squall struck, lasting some five minutes. The tow was drifting slowly at the time, with the watch on the front barge, the pilots at their posts, and the gauge in the engineer's room showing all the steam allowed by law. The rain had ceased just before the men-of-war were discovered, and the tow was under as much control as it could be at that point and in the quartering position made necessary by the usual methods adopted for landing.

To obviate a drift too far out in the current there is a necessity to resort to what is known as the flanking movement at that place. By backing toward the shore and keeping close enough to it tows are prevented from drifting across the river. Just before reaching a landing the tow is straightened up and carried in.

In rounding points towboats adopt one of two courses—"steering out" or "flanking." Steering out consists in the towboat backing her stern close inshore, thus throwing her head out into the stream, and then driving ahead at full speed around the bend. Flanking consists in placing the tow broad-side nearly at right angles to the current of the river, the bow extending out into the river and quartering slightly down stream, the stern of the propeller being as close to the shore as safety will admit. In this manner tows are floated down, the steamer backing at intervals as the forces of the current carry the tows out. There is no driving except to get headway to flank on and to keep the stern of the steamer from the shipping by the shore.

Driving under such circumstances is very slight. As the landing is neared the steamer commences to back strong until it comes in a
27 perpendicular shape to the New Orleans shore and parallel with it and then lands. Flanking was the course pursued by the plaintiff's tow on this occasion.

The flanking operation is customary and proper and, in fact, the only feasible course in entering the harbor. Instead of driving ahead at full speed around the bend, precipitating the tow against passing vessels, the

"Future City" backed in as occasion required, keeping far enough away from the shipping by the shore to avoid collision, but keeping up steam to control the load in front.

But was the "Future City" on the wrong side of the river? If so, she navigated wrongfully for mere purposes of her own convenience. In this event the encounter of the danger was needless, inasmuch as the convenience of the one vessel must be subordinated to the safety of others.

If, in conforming to custom, the tow began preparations to land 2 miles or more above, ascending steamers knew of the custom and (equally with the pilots of descending craft) were on the lookout to avoid danger. It is reasonably certain that watchfulness would be exercised by both ascending and descending boats under such circumstances, and especially by the descending craft, as safety was quickly assured without inconvenience by the descending steamer pushing her tow farther out in the river and clearing the fairway for an ascending vessel hugging the shore. This is what the defendants allege the "Future City" did do to avoid a steamer shown to have been passing. Though cleared in safety, it is argued that the "Future City" went so far in the stream she was caught in the current that sets in just about the point of divergence from her course and carried toward the middle of the river. The findings do not sustain the argument. Even if they did, the tow was doing the proper thing to keep out of the way of the coming steamer. It was necessary to go out in the river some to get around the point.

The passing steamer was known as the "Mabel Comeaux." In approaching, the steamer blew one blast of her whistle, thus indicating to the "Future City" her intention to keep to the starboard or city shore and that latter was to keep out of the way. It is argued that if the tow had the right of way, the "Future City" could have kept her course, but failing therein, the collision around the point was the result. The failure of the tow to force the ascending steamer to its right was lawful and proper. When the pilots saw each other they were above Celeste street. When the Comeaux came in sight of the tow the latter was far enough away from the shore for ascending boats to pass safely between, and substantially there was no change in the course of the tow.

The contention that the tow erred in going too far toward the middle of the stream in order to avoid the "Mabel Comeaux" is in conflict with the theory of the defense, that the middle of the river was the place for the tow to descend. We take this argument, however, to mean that the "Future City," having abandoned its right to descend in the middle of the stream and having put herself in the bend where her pilots were unable to see, she should have remained on that side and kept the tow close to the shore, thus forcing an ascending vessel to go to its right in the stream. But if the "Future City" was at fault in leaving the middle of the river in trying to land, then the navigation of tows in rounding points everywhere is dangerous and improper, and the practice adopted by pilots essentially wrong.

28 Before we condemn this practice and establish a new rule for the government of pilots in landing tows we will consider the propriety or impropriety of doing so from the circumstances appearing in this case.

If the line of the current had been followed the tow would have come down the stream to a point somewhere opposite Celeste street. That kind of navigation would have been improper, in that the force of the current upon a steamer and eight loaded barges so far from shore at that point would have operated to prevent the tow from being backed up in time to land. If obliged to go to the right of vessels anchored about the middle of the stream in the direction of Algiers, the towboat would have been carried down far beyond the landing. Thus, the tow would have been denied the right to land if under obligation to descend the middle of the river until the harbor was seen, except by going down and breaking up to be brought back through the crowded harbor one at a time. But loaded barges are not expected to ascend rivers. By descending the middle of the river until in sight of her landing, the advantage of keeping out of the way of unlawfully anchored vessels would have been secured, but the privilege of landing necessarily abandoned.

It is good seamanship to know how to make a landing and take advantage of all the slack water for that purpose. To run for easy places, back in, and reach landings on one side or the other is better seamanship than to deal with adverse currents. With the set-in to the other side of the river from Celeste street loaded barges carried to the middle of such a current would be dangerous because of the tendency to go into the bank or becoming unmanageable in the presence of boats crossing the river.

Ferryboats lie in the current same as tows floating down. The head of each ferryboat is not upstream, nor are they stationary, except as they arrive and depart from their places of landing. Both tow and ferry boat being in motion and floating with the current, collisions do not occur.

Had the tow kept near the shore on the opposite side of the river and continued to a point below Celeste street, the landing on the New Orleans side could have been reached only by crossing the stream. Apparently there would have been much more danger to shipping in the harbor in this procedure than in the course pursued, as barges can not be carried to land like a steamer free from such incumbrances. The space occupied by a tow in crossing the river would have imposed greater danger where vessels were most numerous.

In landing tows steamers propelling them must, of course, turn in somewhere to the bank. If there is reason to believe that danger is ahead sufficient to render escape from collision difficult, measures must be taken to avoid it. Without such knowledge or some reasonable ground to justify the belief that danger is about to be encountered, the descending vessel has the right to obey custom and those rules observed in navigation and sanctioned by usage as safe.

The danger to the tow in this case was an unanticipated peril. The expected source of danger was the shipping in the harbor alongside the landings and places where they were accustomed to be moored, and in outgoing vessels.

The rules of navigation invoked to sustain the alleged fault of being on the wrong side of the river are those applying to the right of
29 way on Western rivers, and it is claimed that under these rules where a descending boat navigates close in to the shore at the

risk of collision with upgoing boats, the steamer descending violates the custom and is blamable for any collision.

Inspectors' Rule I, referring to right of way on most western rivers (Spencer Mar. Coll., sec. 141), and the custom prevailing for the navigation of these rivers under inspectors' Rule V (ibid., sec. 145), and the case of Goslee v. Shute (18 How., 463) cover cases of ascending and descending steamers and the consequences of deviating from a custom established by usage. Their application to a descending boat in the case of others not ascending, but stationed at improper places, is not apparent, but will be considered.

It has been held under Rule I that as between steamboats and flatboats the right of way is with the latter, and the steamer is obliged to avoid them. (The Marshall, 12 Fed. Rep., 921; Spencer Mar. Coll., 288.)

In the navigation of the Mississippi River it is the custom of ascending steam vessels to navigate near the points, and descending steamers, if without tows, to run the bends—that is, the ascending steamers hug the starboard shore, while the descending steamers navigate to the right of those ascending the river. The navigation of tows vary. They are sometimes run across from point to point and then run around the point; but sometimes in turning a point down they are held in the same course and do not cross at all. The course is governed generally by the difference in the river at different places. No fixed rule for the navigation of tows exists for every part of the river. No doubt it is customary for them to recognize the course of an ascending boat to hug the starboard shore (going up) and to keep out of their way. In landing and leaving the harbor there is a customary course at the port of New Orleans. Outgoing vessels run close in to the shipping in ascending; incoming downward steamers and tows find their usual course to the point where it becomes necessary to back in to reach their landings below. There is a clear and well-defined custom at New Orleans respecting the course and practice of tows to land. Descending tows come close in to the shore on the city side of the river. If they did not pursue this course, descending tows would come down in the current so far out the motive power could not back the tow to land. One of the reasons for coming in close to the shore is to catch the slack water near vessels anchored to the shore. This is so as to all landings, and in trying to reach any stopping place in any harbor it is either one side or the other that boats must necessarily pursue.

It is insisted that the custom was improper, negligent, and dangerous, because of the space occupied by any tow in trying to land.

In approaching a harbor it is the duty of steam vessels to approach with care and a moderate rate of speed. Barges and the steamer towing them, like vessels in charge of a tug, are in contemplation of law but one vessel, and that under steam. With no higher rights than steamers, yet in their actual navigation tows are much the same as sailing vessels. There are differences between the movement of steamers with tows and those without them. Steamers land with more ease and dispatch and in less sea room than towboats, and in entering a harbor the currents tell more powerfully against a tow to prevent an easy landing unless the preparations for reaching land are taken in advance of the time necessary to begin preparations to go to the shore by a steamer unattended with barges. On account of their size and bulk

there is greater reason for care and moderate speed in handling tows, but beyond this no greater burden is imposed upon their navigation than other craft.

It is not negligence to navigate a harbor with a large tow, much less a medium-sized one, if the tow be manageable. The navigation of a harbor at night or in a thick fog is not of itself negligence (The "Sylph," 4 Blatch., 24; Ward v. The "Rossiter," 6 McLean, 63; Ward v. The "Dousman," 6 McLean, 231; The "Scioto," 2 Ware, 360; The "Wesley A. Gore," 27 Fed. Rep., 311; Spen. Mar. Col., sec. 157); the only burden imposed by navigation generally, at night or in a fog, being the added care to avoid danger, and this rule would include the navigation of tows.

Tows form an important part of the commerce of our Western waters. The flatboat preceded the use of the steamboat on the Mississippi, and bids fair to supersede the use of steam vessels, except for purposes limited to the handling of tows and the trade of the river at points not reached by railroads or places where discriminating rates are supposed to prevail.

The traffic which coal boats from the Ohio and grain boats from the Missouri make on the Mississippi River is large, and, although unwieldy as compared with steamers, tows pursue their course in comparative safety if experience be any guide. They move slower than steamers, take courses that the latter do not, run the bends where descending steamers keep in the middle of the river, and frequently resort to the one course they can take, where steam vessels can make a choice between channels.

Speaking of the right of vessels to vary their courses, the Supreme Court, in the case of The "John L. Hasbrouck" (93 U. S. R., 407), said: "Vessels of all kinds, whether propelled by steam or sails, are allowed and expected to vary their respective courses to correspond with the well-known sinuosities of the navigable portions of the river, and to avoid the dangers of navigation arising from locks, shoals, and sand bars, as well as from curves and bends in the banks of the river or the channel of navigation." Thus, when a change of course is reasonably necessary to prevent a sailing vessel from running into the bank or encountering any other natural obstruction to the navigation, such change is obviously permissible, necessary changes not being violations of the sailing rule. Rules of navigation vary according to the exigencies of business and the wants of the public. (The "Favorita," 23 Wall., 598.)

Carried to its full extent the argument for the defendants would place the tow in the middle of the river in all cases where there were bends because of danger from ascending vessels, or of stopping at every bend to see if there was anything in the way below. It has been shown that the plaintiff's tow had no reason to anticipate that the operation of the current or the force of the wind or the weight of the tow would have any bearing upon her duty with reference to anything situated as the war vessels, because her managers had a right to expect that the channel at that distance would be clear from steamers leaving the wharf or from vessels brought to anchor at the wharf or in proper places near the shore. Her master had a right to expect that the coast would be clear at that point from steamers coming out from the wharf. The timely measures of precaution required to be taken in all cases relate to evident or reasonably expected dangers without imposing the obligation in the
31 case of tows to abandon the customary methods of flanking around points reasonably supposed to be free from obstruction below in

the pathway of tows within such distance as not to admit of measures to be taken to avoid collision.

The authorities to which we are referred establish fault in particular cases under circumstances widely different from those in the case in bar.

The case of The "Alicia Washburn" (19 Fed. R., 788), was where a steam tug with her tow was going around a dangerous bend where the tide set strongly across the river and a schooner rounding such a bend in the opposite direction was becalmed. It was held that the steam tug was not entitled, as a matter of right, to occupy the full half of the river on the right-hand side; and that tows overtaking each other in that vicinity, unless sailing to the extreme right of the river, should forbear attempting to pass each other until they had gone beyond the points of danger.

In the case of The "Uncle Abe" (18 Fed. R., 270), there was a positive nonobservance of the rules of navigation and a violation of the State statute forbidding steamers to approach or to pass boats ahead of them within 60 feet. This was a case where the tow had come around the Battery in the harbor of New York and was proceeding up the East River, and on approaching another tow from Albany, known as the "Walt Clark," undertook to pass between it and the tugboat "Christian," which was 200 or 300 feet astern, and a little outside of the "Clark." By the inspectors' rules the "Uncle Abe" was bound to go astern of the "Christian," and by rule 19 she was bound to keep out of the way of anything on her own starboard hand instead of keeping near the New York shore and attempting to cross the bows of the other tug between the latter and the other tow. The speed was not checked, and the State law forbidding steamers to approach or to pass boats ahead of them within 60 feet, the "Uncle Abe" was held liable.

In Goslee v. Shute, supra, the collision was chiefly owing to the neglect of the ascending boat to keep near the right bank, and the descending one to keep near the middle of the river. The descending boat had left a landing and resumed her journey, and the ascending steamer had left the way established by usage. The descending vessel being in her proper place, and the ascending vessel being in an improper course, the latter was held liable. Both were steamers unattended with tows. If the ascending boat had continued near the right bank of the river there would have been no collision. The case at bar more nearly resembles one where it was held that barges anchored in a place of manifest danger in the way of tows coming out on the rise of water with pilots ignorant of the anchorage, blame was put on the barges at anchor. (Fawcett v. Morgan, 6 Fed. Rep., 200.)

If usage can make lawful and proper the navigation of a river so that both ascending and descending vessel shall keep to the right of the center of the channel, as on the Hudson River (The "Vanderbilt," 6 Wall., 225), no valid reason can be assigned against the custom of a tow entering the harbor at New Orleans to follow the rule adopted there of going in on the city side of the river to barge landings, even though up-going steamers ascend on the same side, each craft being supposed to know how to avoid direct meeting. Every deviation from custom is at the risk of those not following it.

32 Independent of usage the "Future City" was not in fault, because the course adopted was safest if the object was to land.

If the intention was to go on without landing, the right to round the point in safety was included in the privilege of varying the course for that purpose.

The last question respecting contributory negligence is the conduct and management of the tow after rounding the point from where the ships were first seen. Upon discovering the danger did the master and pilots exercise the proper degree of skill? Was everything done that could reasonably be expected to be done to avoid the collision?

Persons in certain emergencies and called upon to act upon peculiar circumstances are not held to the exercise of the same degree of caution as in other cases (Thurber v. Harlem Bridge Co., 60 N. Y., 326; The "City of New York," 35 Fed. R., 604; Union Pacific Railway Co. v. McDonald, 152 U. S., 281); and whether a vessel threatened with collision without her fault adopts the best course is unimportant if she adopts the one she thinks best. (The "Brown" and The "Hamilton Fish," 35 Fed. R., 60; The "Excelsior," 38 Fed. R., 271; The "City of New York," 147 U. S., 72). Regard must always be had to the exigencies of the injured party's position and to all the circumstances of the particular occasion (Kane v. Northern Central Railway Co., 128 U. S., 95); and where human life and personal safety are involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances under which that effort was made show recklessness or rashness (U. P. R. R. Co. v. McDonald, supra). And where one vessel is brought into immediate jeopardy by another's fault, such vessel is not liable because she has not been managed with perfect skill and presence of mind. (The "Maggie Smith," 123 U. S., 349; The "Blue Jacket," 144, U. S., 391, and authorities cited.)

Change of course on the water in an emergency does not render the vessel so changing her course liable for resulting collision. (The "Schmidt" v. The "Reading," 43 Fed. R., 815; The "Agnes Manning," 44 Fed. R., 110.) The charge of negligence here, however, is the failure of the tow when confronted with the men-of-war to get out of her course and abandon the attempt to reach the landing and, instead of seeking to go between the ships and the city side of the river, to have made an effort to clear the anchored vessels by going to the side of the river opposite the landing. The collision may possibly have been averted, it is true, if, when the ship was sighted, the tow had made for the Algiers shore. But it is not probable, in view of the short distance between the tow and the ships after their discovery, and in view of the strength of the current there, that the collision could have been averted. It is more probable that any attempt to cross the river above the men-of-war at that time and place would have resulted in a collision even more disastrous than that which actually took place. For an act resolved upon in extremis under such circumstances the plaintiff can not be held responsible. (The "Sarah Thorp," 44 Fed. R., 637; The "Nichols," 7 Wall., 666.)

If the ships were in exposed and dangerous places, their officers are not in position to assert that the tow should have been propelled across the bow of the forward ship, even though the wrong means appeared to have been chosen by the tow to get out of the way. In such cases the
33 law will not hold the pilot of the tow guilty of fault unless his seamanship was clearly unskil'ful. (The "Favorita," 18 Wall., 603.)

The tow was advancing at a slow rate of speed, and at a rate not as great as the current. This speed was not over 5 miles an hour. The "Future City" had, but a short distance above the point and before commencing to round it, signaled its approach to an ascending boat. Signals are to be used when the circumstances make them necessary, and while the warning was not what the men-of-war could claim as a matter of right, lying at unexpected places and unseen by the watch or pilots of the tow, no response was made. Signals from the "Future City" availed nothing anyway, as the ships were lying dead in the water and could do nothing to relieve the situation. The helplessness created by the ships' officers can not excuse the injury done to others at the time and place. Immediately upon discovering the ships the master of the tow directed the pilot to go ahead so as to pass to the right in order to avoid tearing the wheel at the stern by the shipping along the shore. The pilot replied that by going ahead the whole tow would be wrecked, and acting on his judgment, the tow was backed, but without avail. The ships were discovered too late. The "Future City" backed the tow under full head of steam, working full stroke, with all the steamer's power, to check the headway and straighten the tow. The object was to bring the tow broadside to the shore, so as to pass between the "Atlanta" and the landing side of the river. It is not disputed that (in the language of the river) the "Future City" was "gonged" and every effort made to straighten the barges, which, if completely successful, would have entirely averted the disaster. The headway of the steamer had only been lost to the extent which the quartering position taken to get to the shore made necessary. The tow was in as much control of its motive power at the time of the discovery of the vessels as any tow could well be engaged in an attempt to land at such time and place. Fault can not be inferred from the methods used to descend as in the case of an ascending steamer approaching a landing in the face of a high wind and sensible enough of danger not to attempt to fasten to another steamer already lying at the wharf, but where blame was attached for backing on a flatboat in ground designated for flatboats, in trying to land above the flatboat. Such a case was Culbertson v. Shaw (18 How., 585, cited by the defense), where the river was open and a safe landing might have been made if the steamer had turned instead of voluntarily losing its headway by the order to back down to the flatboat. In this case the river was not open and the discovery of the ships found the tow at an angle with a landing impossible if the "Future City" had not kept backing with the danger of collision greater if the attempt had been made to cross the bow of the improperly anchored ship below.

The distance between the tow and the ships when the latter were discovered by the tow on rounding the point opposite Celeste street was the distance from that point to the place where the "Atlanta" lay opposite Race street. In that distance the tow could not check its headway or change its course. In the effort to keep out of the way the "Future City" came within a short distance of the shipping moored by the river bank next to the city, and everything possible was done to avoid the
34 collision. The findings on this point are sustained by all the evidence, including an official report. The lead barge, on the port side, struck the ram of the "Atlanta" broadside on; the tow went on with the current toward the "Galena," lying some 400 feet astern of the "Atlanta" and closer to the New Orleans shore than the latter. As

the "Future City" reached a point opposite to her the lead barge on the starboard side struck the "Galena" and was sunk. This resulted in an unloosed barge being carried by the current into collision with the "Richmond," still nearing the landing.

The accident was not the result of natural causes occasioned by the forces of wind and current. In cases where the loss is occasioned by a storm or other vis major, each party must bear his own loss, upon the principle that no one is responsible for loss produced by causes over which human agency could exercise no control. In the case of the "Grace Girdler" (7 Wall., 196), inevitable accident was declared to be where a vessel is pursuing a lawful vocation in a lawful manner, using the proper precautions against dangers, and an accident occurs. Where collision occurs exclusively from natural causes and without any negligence or fault either on the part of the owner of the respective vessels or of those intrusted with their control and management, the rule applies, but if fault or negligence be shown to have been committed by one or the other the rule can have no application. (Union Steamship Co. v. New York and Virginia Steamship Co., 24 How., 307; Sampson et al. v. United States, 12 C. Cls. R., 480; the "Clarita" and the "Clara," 23 Wall., 1.) When the respective vessels are seen by the other, and disasters occur, it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident. (The "Morning Light," 2 Wall., 560; the "Pennsylvania," 24 How., 330.) Tested by these rules, the defense of inevitable accident fails in the case before us. No natural causes operated to render the navigation of the river unsafe for the towboat to enter the harbor. The river currents were not such as to interfere with the methods adopted by the towboat to land its barges in the places they were entitled to go. The wind and rain had no appreciable effect upon the movements of the tow. Whatever blow there was at the time was encountered after the attempt to land had been begun, and was not of sufficient violence to interfere with the course the tow would have pursued independent of the wind and rain, which had subsided by the time the vessels were discovered. The weather did not delay the discovery of the ships, concealed as they were by the permanent obstructions on the shore and by vessels moored along the river banks. Due care and caution, with a reasonably proper display of nautical skill, was shown on the part of the plaintiff's agents. It should not be made to suffer for the fault of others. These officers located their ships in that part of the river which tows were in the habit of using to make their landings. They took no notice of the rights of others, or ignored the chairman of the board of harbor masters. In either event the consequences of their negligence are the same.

The opinion of the court is that the plaintiff is entitled to recover the value of the property destroyed and amounts necessarily expended in repairs to the towboats not destroyed but damaged by the collision, and the amount of freight earnings lost by it. The total damage proved to the satisfaction of the court amounts to $19,808.85, for which judgment will be entered.

35 VI.—*Dissenting opinion.*

PEELLE, J., dissents:

I dissent from the conclusion of the majority of the court in this case, because, in my judgment, the master of the "Future City," with her tow of eight barges, each 225 feet in length, 10 feet hold, and 36 feet beam, loaded to their full capacity, did not exercise ordinary care and caution on entering the harbor of New Orleans or in the handling of her tow after she entered, and that, therefore, even if the vessels of the defendants were anchored at an improper place in the harbor, the negligence of the "Future City" contributed to the collision and the consequent loss of her barges, and there can be no recovery. (The "Martin," 12 Wall., 31; the "Continental," 14 Wall., 345; the "Sunnyside," 91 U. S., 208; the "America," 92 U. S., 432.)

Although the rule of navigation for vessels passing each other on the Mississippi River, and, as adjudicated, Goslee v. Shute (18 How., 463), requires the descending boat to keep near the middle of the river and the ascending vessel to keep near the right shore (and this applies to tows: Snow v. Hill, 20 How., 543, 550), the plaintiff contends that, in respect of a steam vessel with barges in tow on entering the harbor of New Orleans, a different rule prevails, i. e., that in lieu of such rule a well-known custom prevails applicable to tows, and upon such custom the plaintiff grounds its right to recover in this case, though the usage or custom relied upon does not appear to have been ancient, reasonable, generally known, and certain, as required under United States v. Buchanan (8 How., 83, 103).

The special act (set out in Finding I) referring the claim to this court, "with jurisdiction and authority to hear and determine the same to judgment," contains the proviso that "no judgment shall be rendered against the Government unless it shall affirmatively appear from the evidence adduced that such collision was the result of negligence on the part of the officers in command of said vessels of war."

While the language of the proviso but emphasizes the well-known rule of law, it leaves no room to doubt the purpose of Congress in respect of the application of the rule in this case.

What are the facts?

About May 5, 1888, the defendant's vessels entered the harbor of New Orleans and came to anchor, their distances from the western bank varying from 500 to 700 feet, while the entire fleet extended down the river from the barge landing about one mile. (Findings IX and VII.)

In this position the fleet remained until the collision two days later, during which time it does not appear that the harbor master, whose right and duty it was so to do, gave any direction or suggestion to the officers in command to change their places of anchorage. (The "James Gray" v. the "James Frazier," 21 How., 184.)

36 After rounding the bend in the river at the place called the "Elevator" (not shown on the map), about one mile from where the "Atlanta" lay anchored, the towboat began to back, and so continued until her tow, 607 feet in length, was brought, as Finding VIII shows, "into a flanking position nearly at right angles to the current of the

river," with her stern as near the New Orleans shore as safety would permit—i. e., safety to vessels moored along the bank.

In this position she floated downstream with the current, and when about opposite Jackson street a sudden squall of high wind and rain, accompanied with thunder, developed, lasting five minutes or more (Finding VII), during which time the steamboat "Mabel Cameaux" came upstream, hugging the New Orleans shore (Finding VIII), and when nearing the point opposite Celeste street she blew one blast of her steam whistle, thus indicating her intention to keep to the starboard or New Orleans shore, to which the "Future City," notwithstanding her option in the premises (Blanchard v. New Jersey, &c., 59 N. Y., 292), assented by answering with one blast of her steam whistle, thereby compelling her to pass to starboard and to push her tow farther out into the stream in order to do so; and in this position she rounded the bend in the river at Celeste street, and when opposite Richards street, 150 yards from the "Atlanta," with her tow quartering out into the stream and occupying, as the collision demonstrates, nearly one-third of the river's width, she sighted for the first time the defendant's vessels (Finding IX).

In this position and for want of time and space, after sighting the defendant's vessels, she was unable, as Finding XVI shows, to check her headway or straighten up her tow. The same finding shows that, "the width of her tow being 175 feet, the 'Future City' could have passed between the said United States vessels and the New Orleans shore had there been sufficient time and space for her to check her headway and straighten up."

Beyond question, had she kept her place in the middle of the stream, the defendant's vessels would have been sighted much earlier than they were and the collision avoided.

When she rounded the bend in the river at the "Elevator," knowing that her view of the harbor would be obstructed until she passed Celeste street, even if the wind and rain did not obstruct the view, she should have gotten her tow under control—i. e., straightened it up and so kept it until she sighted the vessels in the harbor, and thereby learned the situation, instead of floating down with the current in a "flanking position nearly at right angles to the current;" or if she could not control her tow, as seems probable from the results, she should have broken it up at or prior to the time she reached the "Elevator," or if, as found, the "Atlanta" was only 650 feet from the New Orleans shore, certainly west of the current, and a strong current sweeps from the western to the eastern shore at the bend in the river at Celeste street, then the tow could have been pushed with the current to the center of the stream, or, if necessary, to the right or Algiers shore, and the collision thereby have been avoided.

For assuming, as the plaintiff contends, that for want of time and space, the master of the vessel could not have avoided the collision at the time it occurred, still this will not excuse him if by timely
37 measures of precaution the collision could have been avoided. (The Syracuse v. Langley, 12 Wall., 167; The Vanderbilt v. McKibbon, 6 Wall., 225; Sieward v. Teutonia, 23 Wall., 77; The Connecticut, 103 U. S., 710.)

Certainly it would have been a timely measure of precaution for the "Future City" to have gotten her tow under control and straightened up

after rounding the bend of the river at the "Elevator," or to have gone to the right or Algiers shore, or to have kept in the middle of the stream or divided her tow. In fact, to have entered the harbor in any other way than she did.

A steamer on entering a harbor is required to exercise great care and caution and with suitable and experienced lookouts actually and vigilantly employed in the performance of their duties, the want of which is enough to make a steamer on the Mississippi River liable for a collision. (Culbertson v. The Southern Bell, 18 How., 584; The New York v. Rae, 18 How., 223; The Ottawa, 3 Wall., 269; Transportation Company v. Phila., etc., 22 How., 461; Goslee v. Shute, 18 How., 463.)

And the fact that the "Atlanta" could not be sighted until Richard street was reached imposed upon the master of the "Future City" additional care and caution in the handling of her tow, especially as against vessels at anchor.

The degree of care and caution to be exercised by the master of a steamer with a tow on entering a harbor should be measured, not only by its proximity to known danger, but by known difficulties in apprehending danger as well.

A custom which supersedes the exercise of reasonable care and caution is not reasonable, and should not be allowed to ripen into a rule of navigation.

Entering the harbor with a tow 175 feet in width and 607 feet in length, floating with the current, her tow flanking nearly at right angles to the current, in a stream only 1,800 feet in width, was certainly negligence on the part of the "Future City," and it was by reason of such negligence that she was unable to control and straighten up her tow so as to make her landing in safety.

Having by her negligence, therefore, contributed to the collision, which resulted in the loss sustained, there can be no recovery, and the petition should be dismissed.

38 VII.—*Judgment of the Court.*

THE ST. LOUIS AND MISSISSIPPI VALLEY Transportation Company *vs.* THE UNITED STATES. } No. 18626.

At a Court of Claims held in the city of Washington on the 21st day of March, A. D. 1898, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said claimant, the St. Louis and Mississippi Valley Transportation Company, do have and recover of and from the United States the sum of nineteen thousand eight hundred and eight dollars and eighty-five cents ($19,808.85).

BY THE COURT.

39 VIII.—*Application of defendants for and allowance of appeal.*

THE ST. LOUIS AND MISSISSIPPI VALLEY Transportation Company *vs.* THE UNITED STATES. } No. 18626.

From the judgment rendered in the above-entitled cause on the 21st day of March, 1898, in favor of the claimant, the defendants, by their Attorney-General, on the 5th day of May, 1898, make application for and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Asst. Atty. General.

By GEORGE H. GORMAN,
Special attorney.

Filed May 5, 1898.

40 IX.—*Defendants' motion for new trial. Filed November 11, 1898.*

Come now the defendants, by their Attorney-General, under and pursuant to the provisions of section 1088 of the Revised Statutes, and move the court to grant a new trial in the above-entitled cause, for the reason that, in the judgment heretofore rendered against these defendants in said cause, fraud, wrong, and injustice have been done to these defendants in the following respects and particulars, to wit:

*First. Error of fact in this, to wit: That the diagram set forth in and made a part of Finding VII does not truthfully and correctly represent the places at which the fleet of war ships were anchored in the harbor of New Orleans at the time of the collision with the steamboat "Future City" and her barges.

*Second. Error of fact in this, to wit: That the recital of fact in Finding IX, to the effect that the fleet of United States war ships were anchored at a distance of from 350 to 650 feet from the New Orleans shore, does not truthfully and correctly state the position of anchorage of said war ships, which said ships were in truth and in fact anchored in the middle of the stream and at a distance averaging 1,000 feet from the New Orleans shore.

*Third. Error of fact and of law in this, to wit: That said war ships, as so anchored, were not in the track of tow boats with tows descending the Mississippi River bound for the port of New Orleans, pursuing the proper course of navigation, as is set forth in Finding XI of the findings of fact in this cause.

*Fourth. Error of fact in this, to wit: That in Finding XII it is recited that it was negligent and improper for the United States war ships to anchor upon a single chain, and that being so anchored contributed to or caused the collision in this cause, whereas in truth and in fact it is not improper to thus anchor a ship, and that being so anchored did not contribute to said collision or in any wise cause the same.

*Fifth. Error of fact in this, to wit: That in Finding XVI the court recites as a fact that "As the 'Future City' reached a point about oppo-

*Paragraph marked "objected to."

site to her, the 'Galena,' which was swinging in and out on a single chain, sheered in toward the New Orleans shore and struck barge 68," whereas in truth and in fact said "Galena" did not swing in and out upon her anchor, and did not sheer in toward the New Orleans shore, and did not strike barge 68, but, on the contrary, barge 68 floated down upon the "Galena," while the "Galena" was held steady in her berth by the action of the current.

41 *Sixth. Error of fact in this, to wit: That in Finding XVII the court finds as a fact that when these "vessels visited the port of New Orleans during the winter previous to the date of collision, the officer in command of the squadron, on making inquiry, was directed by the chairman of the board of harbor masters to anchor said vessels as near to the Algiers shore of the river as possible, and was then told that in such an anchorage they could lie in safety and would not interfere with or endanger customary navigation of the river," whereas in truth and in fact this fleet of war vessels was not at the port of New Orleans during the previous winter, nor were said vessels at any time ever in the harbor of New Orleans, except upon the occasion of this collision on May 7, 1888, and whereas in truth and in fact no such conversation was ever had between any officer of this fleet of ships and any board of harbor masters at the port of New Orleans.

*Seventh. Error of fact in this, to wit: That in Finding XIX the facts therein recited do not in fact or in law properly set forth the rules and customs governing the navigation of ascending and descending craft, nor does the same correctly, in fact or in law, set forth the rule of ascending or descending tugs and tows.

*Eighth. Error of fact in this, to wit: That the court finds in Finding VI that the "Future City" and barges comprising her tow were all staunch, sound, and seaworthy, and that the "Future City" was amply powerful and able to handle her said tow under any and all circumstances arising in the navigation of the Mississippi River, whereas in truth and in fact said "Future City" did not possess sufficient power to handle her tow in any case of emergency, and her lack of power in this respect was the direct and proximate cause of the collision. An error of fact in this, to wit: That the court failed to find as a fact that it would require the biggest part of the river for the master of the "Future City" to throw the head of his barge into the New Orleans shore so as to pass around the point at Celeste street, and that said "Future City" would, although backing at her full speed, go down the river for a distance of half to three-quarters of a mile before she could flip her head around, and would go down the river a distance of 1 mile before she could entirely check her headway. (See the testimony of Nicholas Beaver, the captain or master of the "Future City," as given on page 95 of the record, questions 56 to 62, especially questions 59 and 60; and see testimony of claimant's witness, R. C. Plant, record, page 178, questions 40, 41, 42, in which the above facts are testified to by their own witnesses on direct examination, and which have never been contradicted or denied by anybody.)

*Ninth. Error of fact in this, to wit: That in Finding XXIII the court sets forth as a finding of fact that early in 1888 this fleet of war

*Paragraph marked "objected to."

ships, consisting of the "Atlanta," "Galena," "Ossipee," "Yantic," and "Richmond," visited the port of New Orleans, La., during the carnival of the Mardi Gras, anchoring in said port partly below and partly above a point opposite Canal street in said city, and that while in this position complaint was made that said men-of-war were in the way of other craft navigating the harbor. That thereupon the commodore of said fleet sent for the chairman of the board of harbor masters,
42 and, informing him of said complaint, requested said chairman of the board of harbor masters to select for and assign to his fleet an anchor ground where said fleet might lie at anchor out of the way of other craft. Said Brewster did thereupon select for and assign to said fleet a place of anchorage in said harbor, at which place he ordered and required the fleet to anchor. It is then found that the fleet proceeded to sea for a short while, and upon returning to New Orleans dropped anchor at the places of collision as aforesaid, and that the places selected for anchorage by the war vessels were not the places assigned to them by the chairman of the board of harbor masters; and it is further found that upon the return of the war vessels the harbor master was not notified of the fact, nor was word left at the central office that said vessels had returned. Whereas in truth and in fact the aforesaid fleet of war vessels did not visit the port of New Orleans in the early part of 1888, nor at the time of the Mardi Gras carnival of that year, nor at any other time in the year 1888, nor were said vessels ever, at any time, at the port of New Orleans, except on the 5th of May, 1888, and for a short time thereafter.

* Nor is it true that any such order or conversation was ever had between the chairman of the board of harbor masters and the commandant of this fleet of war ships as is set forth in this finding, nor did any such conversation ever occur, nor were any such orders ever given at any time by the chairman of the board of harbor masters. But, on the contrary, and in truth and in fact, during the winter and early spring of 1888 the squadron of vessels consisting of the "Richmond," "Yantic," "Ossipee," "Galena," and "Atlanta," and known as and called the North Atlantic Squadron, was on its annual cruise to South American and West Indian ports; that said squadron of ships was not in the harbor of New Orleans or any other port of the United States during the period of the Mardi Gras festivities in 1888, nor at any time during that year, except on the 5th of May, 1888, as hereafter described; that no such conversation with the harbor master of the port of New Orleans as that described in the above finding was ever had between the commandant or any other officer of this squadron and the chairman of the board of harbor masters, nor was any conversation of any sort ever had between any officer of this squadron and the chairman of the board of harbor masters; that on May 5, 1888, the aforesaid ships, under the command of Admiral Stephen B. Luce, entered the Mississippi River for a short visit; that before entering said river the admiral of said fleet signaled for pilots, and that in obedience to said signal regularly licensed and authorized pilots were taken on board the several ships, including the "Richmond," for the purpose of piloting them up the river and selecting a place of anchorage off the city of New Orleans; that under the direction of the

* Paragraph marked "objected to."

pilots thus taken on board the ships proceeded up the river until the "Richmond" reached a point in midstream somewhat above Canal street in the city of New Orleans, about opposite the landing slips of the Texas and Pacific Railroad, which point was designated by a pilot on board of the "Richmond" as being the proper place of anchorage of that ship.

43 Accordingly orders were given the ships to anchor in the inverse order in which they were steaming, so that the ships were anchored one behind the other at suitable distances, the "Richmond" being last ship downstream, preceded by the "Yantic," the "Ossipee," the "Galena," and the "Atlanta," in the order named, the "Atlanta" being the first ship upstream and being anchored at a point about midriver, slightly below Race street. That the admiral of this fleet nor any officer in command of any vessel composing it did not in anywise designate or control the place of anchorage, but the same was entirely selected by the pilots which he had authorized to be taken on board for that purpose. That during the forty-eight hours which elapsed between the time that the ships came to anchor and the time that the towboat "Future City" collided with the "Atlanta" no protest or objection was made to this place of anchorage by anyone, nor was the admiral of said fleet or any other officer informed by the harbor master or any other person, before or after that time or at any time, that said place of anchorage was improper and dangerous; that there were no physical indications that such place of anchorage was improper or dangerous, but, on the contrary, said place of anchorage had every appearance of being entirely suitable and proper for that purpose.

Said place of anchorage being in the middle of the river, there was ample room for ships to pass on either side; that the vessels as so anchored were anchored in the only proper and careful manner of anchoring a war ship in a running stream, to wit, upon a single anchor; that the effect of a current upon a ship thus anchored is to hold her steady in her berth and keep her constantly pressing downstream; that ships thus anchored do not and can not swing back and forth upon their chains for the reason that the current does not change, but is constantly exerted in one direction, the tendency of which is to make the ship tug at her anchor in an effort to float downstream, and that nothing short of an unnatural and overwhelming force exerted from the other direction could possibly make the ship swing upstream. That the "Richmond" did not swing in and out upon her anchor and did not strike barge "68," but that said barge floated down upon the "Richmond" and fouled her across her hawse; that it is not only not negligent or improper to thus anchor a war ship in a strong running stream, but that any other method of anchoring it would be negligent and improper. That the conditions are entirely different from those which obtain where a ship is anchored in a roadstead or tidal waterway. Vessels lying at single anchor in a current or tidal way instead of being moored, have the great advantage of being able, by the use of the helm, to sheer out of the way of other vessels or derelicts floating down upon them. Avoiding collisions by this means is no uncommon experience among seamen, and it was by resorting to it that the "Richmond" upon this occasion was able to confine the collision to

barge "68," and to prevent the disastrous consequences which would have ensued had the "Richmond" been anchored upon a double anchor, so as to have been unable to shift her position by the use of her rudder.

In support of the foregoing allegations, the defendants file herewith, as a part of this motion for a new trial, and ask that the same be
44 received and considered as a part of this motion as fully and as completely as though the same were in full set forth in said motion, the following affidavits of witnesses whose testimony was not before the court upon the former hearing of this cause:

*(1) The affidavit of Stephen B. Luce, rear-admiral of the United States Navy, who was in command of the aforesaid fleet of war ships at and during the time of the collision on May 7, 1888, said affidavit being dated July 15, 1898, and being duly sworn to before a notary public.

*(2) The affidavit of T. A. Lyons, commander in the United States Navy, who, at the time of the aforesaid collision, was executive officer of the flagship "Richmond."

*(3) The affidavit of William H. Reeder, a lieutenant-commander in the United States Navy, and who, at the time of said collision, was executive officer of the United States ship "Galena."

*(4) The affidavit of F. M. Bunce, a rear-admiral in the United States, who, at the time of the collision aforesaid, was the commander of the United States ship "Atlanta."

*(5) The affidavit of William J. Hardee, of New Orleans, La., concerning the width of the Mississippi River at the port of New Orleans, and the custom for a descending steam vessel to navigate in midstream or in the bends of a river, and for the vessel ascending the river to run the points of the shores, and that any steam vessel or towboat that neglects the common rule or custom of such navigation assumes great and unnecessary risks.

*(6) The affidavit of Charles H. Fearing, concerning the places of anchorage of war ships and the cause of the collision.

*Tenth. Error of fact and of law in this, to wit: That in Findings XXIV the court finds that the collisions were the result of neglect on the part of the officers in command of the said United States vessels in bringing them to anchor in improper and unusual positions and in causing them to be anchored on swinging chains. Whereas in truth and in fact said collisions were caused by the unskillful and negligent method by which the "Future City" and her barges navigated through the port of New Orleans and by the fact that said "Future City" did not possess sufficient power to handle her tow in the case of emergency which existed at that time and particularly during the short but severe squall of wind and rain which came up. That the said war vessels were properly anchored in a safe, proper, and convenient place, designated by regularly licensed and authorized pilots, whose business it was thus to pilot ships through the harbor and to select places of anchorage for them. That there was no negligence on the part of any officer connected with any of the aforesaid ships of war, either in the places of anchorage or in the manner of anchoring.

Wherefore, and inasmuch as the judgment of the court has wrought

* Paragraph marked "objected to."

a wrong and injustice against the United States, it is prayed that said judgment be annulled and set aside and that a new trial be awarded to the defendants in this cause.

LEWIS A. PRADT,
Assistant Attorney-General.
By GEORGE HINES GORMAN,
Special Attorney.

DECEMBER 18, 1899.

The motion of the defendants for a new trial was overruled.

BY THE COURT.

45 X.—*Order amending findings of fact.*

ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION Company, *v.* THE UNITED STATES. } No. 18626.

Order.

It is ordered that the findings of fact heretofore filed in the above-entitled cause on the 21st day of March, 1898, be amended as follows:

Strike out, on motion, Findings XVII and XXIII.

Substitute for Finding XXIII the following:

"Upon the arrival of the war vessels in May at the port of New Orleans the harbor master was not notified of the fact, nor was word left at the central office that the said vessels had arrived. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet and was without knowledge of the places taken in the river by the said war vessels."

Filed December 18, 1899.

BY THE COURT.

46 XI.—*Defendants' motion for new trial. Filed January 23, 1900.*

Come now the defendants, by their Attorney-General, and under and pursuant to the provisions of section 1088 of the Revised Statutes of the United States move the Court of Claims to set aside and annul the judgment heretofore rendered against them in the above-entitled cause and to grant to said defendants a new trial in said cause, for the reason that in the judgment heretofore rendered against said defendants fraud, wrong, and injustice have been done to the defendants in the respects and particulars more fully and completely set forth in the defendants' motion for a new trial filed on November 11, 1898, and overruled by the court on December 18, 1899, after having amended the findings of fact filed March 21, 1898, by striking out Findings XVII and XVIII; and in addition to the wrong and injustice done to said defendants in the particulars specified in the aforesaid defendants' motion for a new trial, the defendants now further point out and allege fraud, wrong, and injustice to them done by the order of the court in substituting for original Finding XXIII the

finding which the court filed on December 18, 1899, in lieu thereof, which is in the words and figures following, to wit:

*"Upon the arrival of the war vessels in May at the port of New Orleans the harbor master was not notified of the fact, nor was word left at the central office that the said vessels had arrived. The harbor master exercised no personal supervision over the matter of the anchorage of the fleet and was without knowledge of the place taken in the river by the said war vessels."

*The defendants now show and exhibit unto the court that this said finding works great wrong and injustice to the United States, in that the same is wholly contrary to the evidence in this case and is utterly unsubstantiated by one single syllable of testimony to that effect, but on the contrary, as was shown by the affidavits filed with and made a part of the defendant's motion for a new trial filed on November 11, 1898, and as is shown by the further affidavit of Capt. C. M. Chester, which is filed herewith and made a part of this motion as fully as though the same were incorporated herein, the said fleet of war vessels anchored in the middle of the river at the port of New Orleans in the precise manner and at the precise places designated by the duly authorized and licensed pilots
47 which had been taken on board of said vessels for that purpose, and that said vessels remained in such position for the period of forty-eight hours and more prior to the collision with the steam towboat "Future City" and her barges, during which said time neither the harbor master nor any other person made complaint that said vessels were anchored at an improper place or in anywise notified, requested, or required any officer of the said fleet to change such place of anchorage, and each and every of the officers of said war ships were wholly without intimation or notification or knowledge that said place of anchorage was in anywise dangerous, unlawful, or improper, nor was there anything in the physical surroundings to in anywise so apprise them, but, on the contrary, every physical condition indicated that the place of anchorage was a proper and suitable place.

*This motion is based upon the affidavits heretofore filed with and attached to the defendant's motion for a new trial filed November 11, 1898, and in addition thereto the affidavit of Capt. C. M. Chester, who was the commanding officer of the ship "Galena" at the time of said collision, and was an eyewitness of the same from the topgallant forecastle of his said ship, whose said affidavit conclusively shows that these war ships were anchored in the middle of the stream; that they were anchored there by duly authorized and licensed pilots; that they did not swing in and out, or yaw upon their anchor chains; that the ship "Galena" did not veer in and strike barge 68; that the said steamboat "Future City" did not possess sufficient power to handle her tow under the conditions of wind, tide, and weather then and there prevailing, and that said collision was in nowise due to any negligence on the part of the officers in command of said ships of war, which said affidavit is hereto appended and is to be taken as a part of this motion as fully and completely as though the same were incorporated herein. And the defendants further show and exhibit to the court that the reason why said affidavit of said Capt. C. M. Chester was not presented to the court, together

*Paragraph marked "objected to."

with the affidavits of the other officers in command of these ships upon the date of the former motion for a new trial, was solely due to the fact that said Capt. C. M. Chester was at that time in command of a United States ship of war operating against the public enemy in the late war between the United States and Spain, and consequently his affidavit could not at that time be procured.

*Wherefore the defendants pray that said judgment heretofore rendered against them be annulled and set aside, and that a new trial be awarded to these defendants in the above-entitled cause.

L. A. PRADT,
Assistant Attorney-General.

By GEORGE H. GORMAN,
Special Attorney.

48 XII.—*Defendants' motion for a reformation of the findings of fact.*—Filed January 23, 1900.

[NOTE BY THE CLERK.—By direction of the court, parts of this paper have been omitted pursuant to the order of June 9, 1900, at the beginning of this record.]

Come now the defendants, by their Attorney-General, and show and exhibit unto the court that the findings of fact filed in this case on April 11, 1898, and the substituted finding of fact which was filed by order of the court December 18, 1899, are erroneous and contrary to the evidence, and work great fraud, wrong, and injustice to the United States; and therefore said defendants move the court to amend and reform said findings in the following respects and particulars, to wit:

I.

Strike out the substituted finding filed by the court on December 18, 1899. * * *

* * * I therefore ask that this substituted finding be struck out and that the court find in lieu thereof the following:

That on May 5, 1888, the said war ships entered the Mississippi River and signaled for pilots, and that in obedience to said signal regularly licensed and authorized pilots were taken on board several ships, including the "Richmond," for the purpose of piloting them up the river and of selecting a place of anchorage off the city of New Orleans; that under directions of the pilots thus taken on board the ships proceeded up the river until the "Richmond" reached a point in mid river, somewhat above Canal street in the city of New Orleans and about opposite
49 the landing of the Texas and Pacific Railroad, which point was designated by the pilot on board the "Richmond" as being the proper place of anchorage of that ship. Accordingly orders were given the ships to anchor in the inverse order in which they were steaming, so that the ships were anchored one behind the other at suitable distances, the "Richmond" being the last ship downstream, preceded by the "Yantic," the "Ossipee," the "Galena," and the "Atlanta," in the order named, the "Atlanta" being the first ship upstream and being anchored at a point about mid river slightly below Race street; that the admiral of this fleet, or any officer, in nowise designated or controlled

*Paragraph marked "objected to."

the place of anchorage, but that the same was entirely selected by the pilots which had been taken on board for that purpose; that during the forty-eight hours which elapsed between the time that the ships came to anchor and the time that the towboat "Future City" collided with the "Atlanta," no objection or protest to this place of anchorage was made by anyone, nor was the admiral of the said fleet ever informed by the harbor master, or by any other person, before or after that time, or at any time, that said place of anchorage was improper and there were no physical indications that such place of anchorage was improper, but, on the contrary, said place of anchorage had every appearance of being entirely suitable and proper for the purpose.

* * * * * * *

II.

Strike out in Finding XVI the following words:

As the "Future City" reached a point about opposite to her, the "Galena," which was swinging in and out on a single chain, sheered in toward the New Orleans shore and struck barge 68, which was the lead barge of the said tow, on the starboard side.

* * * * * * *

III.

There should be added to Finding XV, at the bottom thereof, the following:

The said steam towboat "Future City," in descending the Mississippi River, as described in this and the other findings, would require most of the width of the river in order to throw the head of her tow in toward the New Orleans shore and straighten herself and tow up so as to descend the river in a horizontal instead of a flanking position, and the said steamboat could not accomplish this in a width of 1,000 feet. The said steam towboat, exerting all of her power, would descend the stream from one-half to three-quarters of a mile before she could straighten herself up from her flanking position to a horizontal one, and would descend the river at least one mile before she could check her headway and begin to back upstream.

* * * * * * *

50 IV.

Finding XII should be wholly omitted. * * *

V.

The whole of Finding IX should be omitted.

* * * * * * *

VI.

The following finding should be added:

At the time of the collision the stern or wheel of the steamer "Future City" was 250 feet out in the river from the docks and shipping on the

New Orleans side. "Barge 73" struck the "Atlanta" on the barge's port side amidships.

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L. A. PRADT,
Assistant Attorney-General.
By GEORGE H. GORMAN,
Special Attorney.

XIII.—*Order of the court filed May 14, 1900.*

THE ST. LOUIS AND MISSISSIPPI VALLEY Transportation Company v. THE UNITED STATES. } No. 18626.

At a Court of Claims held May 14, 1900, the defendant's motion for a new trial was overruled, the former findings of fact were withdrawn, and new findings of fact and opinions were filed.

BY THE COURT.

51 XIV.—*Allowance of appeal.*

THE ST. LOUIS AND MISSISSIPPI VALLEY Transportation Company v. UNITED STATES. } No. 18626.

At a Court of Claims held May 21, 1900, Mr. Assistant Attorney-General Pradt, for the defendants, presented an application for the allowance of appeal, and it was allowed as prayed for.

BY THE COURT.

52 In the Court of Claims.

THE ST. LOUIS AND MISSISSIPPI VALLEY Transportation Company v. THE UNITED STATES. } No. 18626.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, of the findings of fact and conclusion of law, of the opinion of the court and the dissenting opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 13th day of June, A. D. 1900.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsement on cover:) File No. 17807. Court of Claims. Term No., 322. The United States, appellant, vs. The St. Louis and Mississippi Valley Transportation Company. Filed June 20, 1900. Office Supreme Court of U. S. Received June 20, 1900.

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